93-506

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

JEFFREY WILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NANCY HOLLANDER
Counsel of Record
Freedman, Boyd, Daniels, Peifer,
Hollander, Guttmann & Goldberg, P.A.
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102
(505) 842-9960

NINA J. GINSBERG
DiMuro, Ginsberg & Lieberman, P.C.
908 King Street
Alexandria, Virginia 22314
(703) 684-4333

Counsel for Petitioner

QUESTION PRESENTED

Whether the district judge's mental incapacity caused such a departure from the accepted and usual course of judicial proceedings as to deprive petitioner of due process in the consideration of his motion to dismiss the indictment obtained in violation of *Kastigar v. United States*, 406 U.S. 441 (1972), and in consideration of numerous trial and post-trial rulings that required the exercise of legitimate and meaningful discretion.

PARTIES TO PROCEEDINGS BELOW

The parties below, in addition to the petitioner, were the United States Government, represented by the Assistant United States Attorneys, Patrick J. Reinert and Steven M. Colloton, and Curtis Holub, represented by David McManus and John Wesley Hall, Jr.

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The petitioner, Jeffrey Wiley, respectfully requests that this Court issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above proceeding on June 28, 1993.

OPINION BELOW

The opinion of the Eighth Circuit is reported at 997 F.2d 378 (8th Cir. 1993), and is reproduced at App. 1-15.

JURISDICTION

The judgment to be reviewed was entered on June 28, 1993. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1). The basis for federal jurisdiction in the district court was 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

This petition arises from the district judge's mental incapacity during the petitioner's trial and sentencing in early 1992. The facts began several years earlier, on February 22, 1988, when the petitioner was arrested in Cedar Rapids, Iowa, allegedly in possession of approximately 82 pounds of marijuana. He was released after agreeing to cooperate while police officers held him in a hotel room, and after consenting to a search of his business premises where the police found approximately 30 pounds of marijuana.

The police interviewed petitioner in the hotel room after representing that the information would not be used against him. A few days later he changed his mind about cooperating. He was not indicted until three and one-half years later, on September 26, 1991. The charges stemmed solely from the crimes relating to the approximately 110 pounds of marijuana seized on February 22, 1988, including the criminal forfeiture of the business known as Jeff Wiley Enterprises and the real property on which the business was located.

The petitioner filed a motion to dismiss the indictment on the grounds that the information he disclosed to the police on the night of February 22, 1988, was being used against him in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). The Honorable Donald J. Porter, Senior U.S. District Judge, District of South Dakota, Central Division, presided over the petitioner's case by designation. Before counsel had any direct involvement with Judge Porter, and before counsel realized that Judge Porter was not mentally capable of making discretionary rulings, he issued an order adopting the magistrate's findings on the motion with some modifications, granting petitioner's motion to supplement the record and denying petitioner's motion to dismiss the indictment.

At trial the petitioner was convicted of the substantive counts, partially through the use of information the police uncovered as a

result of his cooperation on February 22, 1988. The jury also returned a verdict forfeiting his real property and his business.

REASONS FOR GRANTING THE WRIT

THE PRESIDING JUDGE WAS MENTALLY INCAPABLE OF EXERCISING LEGITIMATE AND MEANINGFUL DISCRETION CAUSING HIM TO SO DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, WHICH THE APPELLATE COURT SANCTIONED, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner Was Denied His Right to a Fair Trial Because the Presiding Judge Was Incapable of Exercising Legitimate and Meaningful Discretion in Consideration of His Motion to Dismiss the Indictment Obtained in Violation of ***Kastigar v. United States****, 406 U.S. 441 (1972), and in Consideration of Numerous Trial and Post-Trial Rulings That Required the Exercise of Discretion.*

A. Introduction And Material Facts

During the proceedings, it became apparent that Judge Porter had serious difficulties remembering and understanding much of the evidence. His difficulties were most noticeable during arguments regarding abstract legal issues. As the examples will demonstrate, he frequently could not maintain a thought long enough, nor remember the words necessary, to complete a sentence. There were occasions when he could not remember his own previous rulings in the instant case, or even who was on trial.

Judge Porter attempted to compensate for his difficulties by requiring counsel to present all matters in writing. His written

orders reflect a coherence which he could not maintain on the bench. Therefore, counsel must assume that someone other than Judge Porter was the author of those written orders. This assumption was confirmed during the sentencing of the co-defendant, Curtis Holub, when the judge did not realize that his written order contained certain findings until after he read the order in open court. App. at 60-63. Having no other remedy during the midst of trial,[1] counsel spent considerable time attempting to help the judge recall and understand the issues before him.

After the transcript had been created for appeal, counsel sent a representative sample of the transcript pages to Stephen J. Chiulli, Ph.D., an expert in neuropsychology, for his review. Dr. Chiulli's affidavit, his curriculum vitae and the transcript pages he reviewed were part of the record on appeal. App. at 16-63.

Obviously, counsel could not provide Dr. Chiulli with Judge Porter's medical records. Therefore, Dr. Chiulli's ability to reach a definite conclusion was severely hampered. Nonetheless, Dr. Chiulli's affidavit expresses his expert opinion that two major problems in cognitive functioning occur consistently throughout the transcripts and that these problems "are likely to have a negative impact on the judge's ability to adequately process the material presented to him in any form." App. at 17. According to Dr. Chiulli, the most frequent problem is a serious difficulty in finding the appropriate word. This problem arises in individuals who cannot retrieve specific words and try to compensate for that problem by circumlocution; i.e., speaking around the issue. The second problem is memory difficulty.

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[1] During the oral argument in this case before the Eighth Circuit, the government argued that counsel should have attempted to recuse Judge Porter or seek assistance from the Chief Judge of the District. Chief Judge Richard S. Arnold responded to that argument by saying that the petitioner's only remedy was in the Circuit because the Chief Judge of the District had no authority over a judge the Circuit had designated.

Based on the material he reviewed, it was Dr. Chiulli's opinion that "the individual identified in the transcript as 'the Court' seek immediate medical attention." App. at 17. Based on this affidavit, counsel requested that the appellate court reverse petitioner's conviction or remand the case for a hearing to determine Judge Porter's mental competency to preside as a judge pursuant to Article III of the United States Constitution. The appellate court did neither. Although it considered the arguments "serious," the appellate court found any error in the proceedings to be harmless. App. at 15.

In addition to the pre-trial *Kastigar* issue, the petitioner's trial and sentencing involved many complex discretionary rulings. The proceedings required the active presence and participation of a judge to protect the petitioner's rights. This petitioner did not have the constitutionally mandated benefit of such a judge.

B. The Transcript Establishes the Judge's Mental Incapacity to Make Discretionary Rulings.

The transcript is replete with illustrations of Judge Porter's inability to make discretionary rulings because he could not fully understand the nature and substance of the evidence. The following are a few of the most glaring examples and are taken from the transcript pages reviewed by Dr. Chiulli: App. at 23-63.

1. Judge Porter habitually was unable to formulate coherent sentences.

> THE COURT: Any one of those, I don't think there's any dispute, legally, about that, and if you ask him and he says—he denies it, or something, why, then I would—you could follow up, but it's all contained within this pasture here, and it's really—you really ought to propose to me the questions you want to put to him rather than I should try to guess what you're going to do and follow you around.

MS. HOLLANDER: I'm happy to do that, Your Honor, ...

App. at 30.

MS. HOLLANDER: Is the Court ruling then? I need a ruling on this, Your Honor.

THE COURT: I'm ruling this—How we heard counsel state, at my request, counsel contended essentially, by and large, I agree with that.

MS. HOLLANDER: Is the Court then denying my request to take this witness outside the presence of the jury and do a complete proffer of the cross-examination?

THE COURT: Yes.

(The side-bar conference ended.)

THE COURT: Please proceed, counsel.

App. at 30.

THE COURT: Then if I were to give an instruction to the jury I'm going to give one on this similar acts anyway, but instruct the jury that—or—it isn't an instruction, but in some manner the jury could be advised that the—well, I could advise the jury that I'm only permitting—that—in some manner, this very thing, that your only contention—stipulation that the transcript is to be understood and—the recording is to be understood as—it's the Government's position that they rely on the—solely on the testimony of—I don't want to just get something—

App. at 32.

MR. REINERT: You're going to play just the final portion, Your Honor?

THE COURT: All right—That's right. I would consider more seriously playing it all, but perhaps that might tend to the—it is and it isn't. Maybe I just—In a way, I don't think it's as big as—15 minutes later I'm not sure.

Do you have anything parting?

App. at 33.

THE COURT: No, no. It's difficult really to be fully conversant with all of the aspects that have to be considered, and this is—I don't—this is—I don't consider this—in fact, the one that I was looking at when I was announcing that I was adopting that had been filed with the clerk, but it was made up by the prosecutor, and I'm certainly if there's some part that—Well, I think your record is—of objecting is made.

App. at 45.

2. Judge Porter did not remember that he had previously ruled on petitioner's motion to suppress evidence.

MS. HOLLANDER: —and we contend that that is tainted by the statement he gave where he didn't have his Fifth Amendment privilege.

We also contended that that consent to search was involuntary because he had no *Miranda* warnings and because he was in a hotel room surrounded by four or five officers who were telling him he should cooperate.

THE COURT: Well, I can have a hearing to determine whether he gave whether he was—just a minute—two different things—

MR. REINERT: Your Honor, this suppression motion, we previously had a hearing in front of the magistrate, and the Court has already denied this motion.

MS. HOLLANDER: That's correct, Your Honor, but the law requires us to make that again at trial.

THE COURT: That's all right.

MS. HOLLANDER: I'm doing it now.

App. at 25.

3. Judge Porter forgot that only one defendant was on trial.

(Side-bar conference out of the hearing of the jury.)

MS. GINSBERG: We would object to the admission of this evidence on the grounds that it's irrelevant to Mr. Wiley; that it's more prejudicial than it is probative, and also that it is 404(b) evidence not related to the conspiracy that is charged, and on those bases we would object to the admission of this evidence.

THE COURT: Who—is 404(b)—against who?

MS. GINSBERG: This is a drug deal between Mr. Mottinger and Mr. Holub—

THE COURT: I mean, who's being—which individual is getting the 404(b) other acts against him?

MS. GINSBERG: Mr. Wiley—I assume that this is being offered against Mr. Wiley or the prosecutor wouldn't be trying to put it into evidence. . . . .

App. at 26.

4. Judge Porter frequently could not keep track of the exhibits or of the witnesses.

MS. HOLLANDER: Your Honor, I'd like the clerk to mark this exhibit as Defendant's Exhibit A, and I'd move it into evidence at this time.

THE CLERK: It will be marked as Exhibit 69.

MR. REINERT: Your Honor, I believe that's just a demonstrative exhibit.

THE COURT: But it's a way to keep track of it.

MS. HOLLANDER: Your Honor, I'd like the witness to come down and initial it, and we would offer it into evidence at this time.

THE COURT: Well, ordinarily these are only for—used for the purpose of enabling the jury to follow and it's not ordinarily taken in as an exhibit, so you can use it as an illustrative method, counsel.

MS. HOLLANDER: Okay. Your Honor, I would like the—if I may ask the witness to initial the exhibit?

THE COURT: To do what?

MS. HOLLANDER: To initial the exhibit. I'm offering this into evidence as real evidence, and I'd like the witness to initial the exhibit.

THE COURT: Well, we'll have to reserve ruling on that. Please proceed.

MS. HOLLANDER: I have nothing further.

THE COURT: Now, I'd like—Can you remain there for a moment? I'd like to have counsel meet me at the bar for a brief time.

(Side-bar conference out of the hearing of the jury.)

THE COURT: I don't think I'm understanding you, I guess, but while I'm at it, it is true, it's okay with me if you mark up sheets like that, but 90 percent of the time my experience has been that it will be—it's okay to illustrate it to the jury, but I don't mark it as a permanent—What is the objection that you made?

MS. HOLLANDER: I understand, Your Honor, but since the witness has talked about this and he has confirmed the validity of this, I'm offering it as a real exhibit—

THE COURT: You're offering what?

MS. HOLLANDER: This piece of paper with his initials on it, I'm offering this as real evidence in this case, not just as demonstrative evidence, your Honor . . . .

App. at 27-28.

THE COURT: This is 19 and 45?

MS. HOLLANDER: 33, Your Honor.

MR. REINERT: 19, 45 and 33.

MS. HOLLANDER: These are the two I'm addressing now, 33 and 45.

THE COURT: All right. 19 and 43 (sic) you're addressing, I'll deal with that, then.

MS. HOLLANDER: I'm addressing at the moment— You've already ruled on 19, so now I'm addressing 33 and 45 together because I think the Government will probably move to admit them one after the other.

THE COURT: Uh-huh.

MS. HOLLANDER: We do—

THE COURT: Just a second. Make the offer now so that I know exactly what you're offering.

MR. REINERT: 33 and 45.

THE COURT: Which exhibits?

MR. REINERT: 33 and 45. Those are the two you have in your hand, Your Honor.

App. at 29.

5. Judge Porter was not able to make his own co-conspirator findings, as required by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). As an aid, he requested that the prosecutor provide him with a list of the *Bell* conspirators. The prosecutor did so but failed to include the principal co-conspirator, Patrick McMickle, in the list. While the judge was reading the list, the prosecutor realized his omission and informed the judge that he had left out McMickle. Judge Porter paused for a considerable period of time before he realized that the government's preliminary summary of

the evidence, upon which he was relying, did not include the central co-conspirator. App. at 35, 36, 45.

6. Judge Porter's attempts to formulate jury instructions were among the most noticeable and most painful of his mental failings to watch. Initially, he told the jury to come in ready to hear the instructions and closing arguments and begin deliberations at 9:00 am. He then took most of that day ostensibly to settle instructions while the jury waited. During the entire day, however, he never met with counsel to settle the instructions. When he finally appeared with his set of instructions, he would not permit petitioner's counsel to make objections, announcing that he would do so after the jury retired to deliberate. App. at 36, 42-44. He read the instructions from approximately 5:30 pm until approximately 7:00 pm. The lengthy reading was the result of his inability to look up from the page without losing his place. Each time he lost his place he would have to begin reading the instruction again.

> Earlier on this page I did refer to a Count 10—I intended to refer to Count 10, but I said Count 2, but I referred to Count 7. That's the one I took, and then the next one was Count 10. So those are on page 12. You'll have this same set of instructions typed which I'm reading to you that will go into the jury room with you and you can refer to it at your leisure.

App. at 37.

> Under Count 10, the Indictment charges that Jeffrey Wiley did knowingly and intentionally possess with intent to distribute, and did aid and abet the possession with the intent to distribute, a specified amount of marijuana, a Schedule I controlled substance, on or about February 22nd, 1988"—
>
> Well, members of the jury, I will read what is 13 so that I put both these together.

App. at 37, 38.

> The page I just finished reading, members of the jury, I left one and a half lines out, so I'll read it to you again. "The law recognizes two kinds of possession: actual possession and constructive possession." The lines I left out I'm reading to you now. "A person who knowingly has physical control over a thing, at a given time, is then in actual possession of it"—I'll finish the page. "A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. Constructive possession is knowledge of presence plus control. A person has constructive possession"—You'll recognize that I've read this part to you.

App. at 38, 39. At one point he became hopelessly confused. He moved papers around on his desk in a seemingly random manner for several minutes until he finally announced a recess. Court was in recess from 6:07 p.m. until 6:33 p.m., during the middle of the charge to the jury. App. at 40.

When Judge Porter returned, he read the instructions relating to one count which he had previously omitted in its entirety. The prosecutor realized that the instruction did not include a necessary requirement that the jury find the elements beyond a reasonable doubt. The prosecutor attempted to explain this to the judge and requested that he add the necessary language. Judge Porter did not seem to understand the problem; he read the incorrect instruction a second time. App. at 41, 42.

Judge Porter finally concluded his charge to the jury and the jury began deliberating. He then belatedly allowed counsel to argue the instructions and realized that he had improperly instructed the jury. When the jurors arrived at 9:00 am on the following

morning, he locked the members of the jury out of their room, sent them to lunch at 10:29 a.m. (App. at 44) and finally read the entire set of instructions again, including the corrected ones. The second reading also contained numerous instances of repetition:

> Well, members of the jury, you'll have these in the jury room, so you can look at them any time, but I'm reading on page 19, and I'm talking about Count 12 and I may have omitted inadvertently a few lines, and it wouldn't really—perhaps I could do this in this manner: I've already read the elements of Count 12 to you really twice, and that's what I just finished doing, and but—so I will just give you this much. Now, this relates, as I said, to Count 12, page 19.

App. at 49; *see also* App. at 45-53. Judge Porter continued to have these difficulties during the second reading even though his courtroom deputy sat next to him in the witness chair turning the pages and pointing out to him where he should begin reading again, whenever he lost his place.

7. Judge Porter's condition had perceptibly worsened by the time he sentenced petitioner, four months after the trial concluded. At the sentencing hearing, he was wholly unable to grasp the matters raised during the evidentiary hearing and could not process information fast enough to take account of the testimony. When counsel contested the probation officer's statement in the PSR that petitioner refused to provide her with information, Judge Porter thought counsel was referring to acceptance of responsibility.

> THE COURT: Well, I'm not very hopeful on that. He has a right— He doesn't have to speak to the probation officer, and I can't penalize him for doing it, but he doesn't earn something that would be like an extra credit, for instance, by—if he elects not to. And I've had a lot of those, and there's—it's pretty—you really have to be pretty definite about how you admit to the alleged offense, very

close to that, and—unless he's—if he wants to do that, it's not too late. It will never be too late until time—until sentence is imposed.

App. at 54, 55.

Judge Porter then announced that the petitioner had not provided the court with any evidence regarding his assets (App. at 57) even though, just moments before, the court had heard detailed testimony from the petitioner's brother and received extensive documentary evidence on this very subject.

8. At the co-defendant, Curtis Holub's, sentencing, which was made a part of the record below (App. at 60-63), the government argued for inclusion of the cost of incarceration in the fine. Judge Porter did not know what the government was talking about, saying "I'm not sure it's a necessary part of the sentence . . . ." App. at 61. At the conclusion of the hearing he began reading a written judgment and sentence that had previously been prepared. He read, "While the defendant is incarcerated in the Bureau of Prisons." At that point he stopped and said, "I guess I have anticipated this and I have it in there." App. at 63. This statement verified what counsel had surmised, that someone, probably a law clerk, was preparing the written orders and that Judge Porter was not aware of their contents.

C. The Trial Judge Could Not Engage in a Legitimate and Meaningful Exercise of Discretion.

Under the American system of jurisprudence, the right to a fair trial must include the meaningful exercise of discretion in the first instance, not merely a record that is reviewed for abuse of discretion or harmless error. By limiting its review to abuse of discretion and harmless error, the appellate court sanctioned the trial court's inability to formulate discretionary rulings and treated

the trial judge's incapacity as harmless.[2] "Mental incompetence is at least as serious a defect as prejudice or interest on the part of a judge, both of which have already been held constitutionally impermissible." *Smith v. Cox*, 435 F.2d 453, 460 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971). In *Smith*, a state prisoner argued that the judge who presided over his case and sentenced him had not been competent. The Fourth Circuit held that the allegations warranted further exploration. The allegations in the instant case also warranted further exploration because the instant case involved many complex discretionary rulings, including the ruling on the *Kastigar* motion. Judge Porter was simply unable to make the rulings necessary in the instant case. All the petitioner could do was appeal to the Circuit and the Circuit refused to consider his request that the appellate court consider ordering a mental evaluation or review Judge Porter's medical records.

Judge Porter's inability to make discretionary rulings undermined the entire trial. Courts have held that "a failure to exercise any discretion, and the resulting failure to engage in any meaningful consideration of . . . [the] question, constitutes an abuse of that discretion." *Metropolitan Life Insurance Co. v. Usery*, 426 F. Supp. 150, 171 (D.D.C. 1976), *aff'd*, 736 F.2d 727 (D.C. Cir. 1984). In that case, the court found that because there had been no meaningful consideration of what would be an appropriate exercise of discretion, the result was an abuse of discretion. Similarly, in *United States v. Guglielmi*, 929 F.2d 1001 (4th Cir. 1991), that court held that a district court judge failed to exercise discretion meaningfully in denying the defendant's motion to reduce sentence, and remanded to the district court for reconsideration of that issue. Essentially the appellate court found that the lower court had failed to balance certain factors in

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[2] In a habeas action where the petitioner argued that his sentencing by a judge suffering from a mental illness was a per se violation of due process, the Eighth Circuit also required a showing of harm or prejudice to warrant relief. *Wabasha v. Solem*, 694 F.2d 155, 159 (8th Cir. 1982).

weighing the proper sentence to impose. Therefore the district court had "failed to exercise its discretion discernably or meaningfully. It has not sufficiently balanced, or demonstrated a balancing of, the nature and character of the offense against Guglielmi's records and his personal character as mandated by Rule 35 and the law of this circuit." *Id.* at 1005.

D. This Court Should Act to Preserve Civilized Standards of Procedure and Evidence.

"Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332 (1943). In *McNabb*, this Court invoked its supervisory power because the "petition for certiorari presented serious questions in the administration of federal criminal justice." *Id.* at 333. The petitioners in *McNabb* were subjected to procedures by officers assuming functions not authorized by Congress. The Court stated that the

> civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

Id. at 616. This petitioner could not look to the trial judge to provide the "learning, good sense, fairness and courage" that this Court considers essential for the fair administration of federal criminal justice.

In the years following *McNabb*, this Court has continued to use its supervisory power, although sparingly, when necessary to ensure that criminal justice is administered properly. This has included numerous cases involving discretionary rulings by the lower courts which this Court found to be abusive. In *Grunewald v. United States*, 353 U.S. 391 (1957), this Court found that a discretionary ruling on an evidentiary issue had "grave constitutional overtones." *Id.* at 423. The ruling at issue was the probative value of a defendant's invocation of his privilege against self-incrimination before the grand jury.

Only two years later, this Court again used its supervisory power to reverse a conviction for abuse of discretion in *Marshall v. United States*, 360 U.S. 310 (1959). In that case, some of the jurors had seen newspaper articles about evidence which the trial court had excluded from the trial. The trial judge had interviewed each juror individually and had found that each was not influenced by the articles and that, therefore, the defendant had not been prejudiced. Although this ruling was within the judge's discretion, this Court again felt constrained to intervene to "apply proper standards for enforcement of the criminal law in the federal courts." *Id.* at 313.

This Court reversed a discretionary ruling on an evidentiary matter again in *United States v. Hale*, 422 U.S. 171 (1975), because the lower court had found no error in admitting evidence of the defendant's silence at the time of arrest to impeach his alibi at trial. This Court found that permitting the cross-examination of the defendant regarding his silence at the time of arrest was an abuse of discretion and reversed his conviction.

These cases share a common thread of concern over the exercise of discretion by trial judges when that discretion interferes with the proper standards of enforcement of justice in the federal courts. Nothing less can be said of the instant case. By finding that any error was harmless, the appellate court avoided its obligation to enforce the proper standards of criminal justice and

guarantee to this petitioner the "learning, good sense, fairness and courage" of the federal judge the appellate court had designated to hear his case.

This question cannot be subject to a harmless error analysis because it involves "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279,___, 111 S. Ct. 1246, 1265 (1991) (Rehnquist, C.J.); *see also Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993). The inability of a trial judge to perform the acts required of him goes to the essence of the criminal justice system. It is the trial judge who must sit as arbiter, determine what evidence the jury may or may not consider, determine when to instruct the jury and in what words, apply the law to the facts, weigh the credibility of witnesses at pre-trial and post-trial proceedings. All of these decisions must be based on reason and consideration.

The appellate court's finding that the trial judge issued rulings that were not clearly erroneous does not mean this petitioner received a fair trial. A criminal case is not decided by the law of averages or by guesswork or by law clerks, no matter how bright they may be. The United States Constitution guarantees to this petitioner the right to a judge who can exercise meaningful and legitimate discretion. This Court should reverse petitioner's conviction and remand for a new trial before a judge who meets the requirements of Article III of the United States Constitution.

CONCLUSION

For the foregoing reasons, petitioner Jeffrey Wiley respectfully requests that this Court grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, and reverse his conviction.

Respectfully submitted,

NANCY HOLLANDER
Counsel of Record
FREEDMAN, BOYD, DANIELS, PEIFER,
HOLLANDER, GUTTMANN & GOLDBERG, P.A.
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102
Telephone: (505) 842-9960

Nina J. Ginsberg, Esq.
DIMURO, GINSBERG & LIEBERMAN, P.C.
908 King Street
Alexandria, Virginia 22314
(703) 684-4333

Attorneys for Petitioner

93 - 506

Supreme Court, U.S.
FILED
SEP 27 1993
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

JEFFREY WILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

NANCY HOLLANDER
Counsel of Record
Freedman, Boyd, Daniels, Peifer,
Hollander, Guttmann & Goldberg, P.A.
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102
(505) 842-9960

NINA J. GINSBERG
DiMuro, Ginsberg & Lieberman, P.C.
908 King Street
Alexandria, Virginia 22314
(703) 684-4333

Counsel for Petitioner

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UNITED STATES *v.* WILEY ET AL.
997 F.2d 378

United States Court of Appeals
for the Eighth Circuit
Criminal Nos. 92-2469, 92-2497

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT FOR THE
NORTHERN DISTRICT OF IOWA
No. CR 91-0009

Submitted Jan. 14, 1993.
Decided June 28, 1993.

Nina J. Ginsberg, Alexandria, VA, argued, for Jeffrey Wiley.*

John W. Hall, Little Rock, AR, argued, for Curtis Holub.

Steven M. Colloton, Asst. U.S. Atty., Cedar Rapids, IA, argued (Patrick J. Reinert, Asst. U.S. Atty., on the brief), for U.S.

Before RICHARD S. ARNOLD, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

Jeffrey Wiley and Curtis Holub appeal their convictions and sentences for distribution of marijuana and other related offenses. We affirm.

---

* Although the published opinion reports that Ms. Ginsberg argued, in fact Ms. Hollander argued on behalf of Jeffrey Wiley.

I.

Wiley owned and operated a motorcycle shop in Marion, Iowa. In addition to repairing motorcycles, Wiley used the business to store and distribute marijuana. He served as a source in a drug conspiracy involving Holub and several others.

Early in 1988, federal drug-task-force agents began investigating this conspiracy. On February 11, Chris Mottinger, who was cooperating with the agents and wearing a recorder, obtained a sample of marijuana from Holub at Holub's home. A few days later, an informant named Newland recorded a conversation between himself, Kevin Meggers, and Wiley, in which they discussed Wiley's drug trafficking. Another cooperating individual, Barton Hoffman, recorded a conversation between himself and Meggers, in which Meggers described Wiley's drug activities. On February 19, Holub sold one pound of marijuana to Mottinger and an undercover agent. He also negotiated another sale with the agent of 50 pounds of marijuana, which was to occur on February 22. On that day, Holub went to Meggers's house to get the marijuana. Wiley was supposed to have delivered it to Meggers. Meggers did not have the marijuana, and the sale between the agent and Holub never took place. At this same time, Pat McMickle was purchasing 82 pounds of marijuana from Wiley at Wiley's shop. McMickle testified that Wiley sold to him rather than to Meggers because Wiley thought McMickle was a better salesman.

McMickle immediately sold the marijuana to an undercover agent and was arrested. He agreed to cooperate and identified Wiley as the person who sold him the marijuana. McMickle also told Agent Badger that Wiley had more marijuana stored in the garage. In cooperation with the federal task force, McMickle returned to Wiley's shop wearing a recorder and told Wiley that the purchasers had not shown up. Shortly thereafter, agents approached and took both McMickle and Wiley into custody.

The agents took Wiley to a motel room, told him they had seized the 82 pounds of marijuana from McMickle, and said

they were interested in his cooperation. Although no one advised Wiley of his rights under *Miranda*, Agent Badger testified that he informed Wiley that if he agreed to cooperate and plead guilty to conspiracy to distribute marijuana, the statements he made would not be used "to formulate additional charges." Wiley claims, however, that Agent Badger said that the information he provided would not be used against him at all. At any rate, Wiley talked and also consented to a search of his business. He gave names of others to whom he was dealing drugs and a very brief sketch of their activities.[1] In the motorcycle shop, Wiley gave them over 30 pounds of marijuana, scales, and a notebook of drug-transaction records. Wiley later decided not to cooperate.

On September 26, 1991, a grand jury indicted Holub,[2] Wiley, and two others, Ronald Tank and Craig Pflughaupt.[3] Count 12 charged all four of them with conspiracy to distribute marijuana. In Counts 1, 2, 3, 5, 8, and 9, the indictment charged that Holub used a communications facility to facilitate the distribution of marijuana. Holub was also charged with two counts of distributing marijuana, Count 4 and Count 6. Count 7 charged Wiley with distribution of 82 pounds of marijuana, and Count 10 charged him with possession of an additional 30 pounds with the intent to distribute. In Count 11, the indictment charged that Wiley managed and controlled a building for the

---

[1] Of the half-dozen persons mentioned by Wiley in his statement, only one, Patrick McMickle, testified against him at trial. McMickle was an employee of the motorcycle repair shop. Wiley indicated in his statement that he had been dealing with McMickle since August of 1987, and that there had been approximately ten one-pound deals, six five-to-ten-pound deals, six 25-pound deals, and four 50-pound deals. The largest deal was the 82 pounds picked up that night.

[2] Holub had already been indicted in a nine-count indictment on December 14, 1988. The District Court dismissed this indictment without prejudice on May 30, 1991, for violation of the Speedy Trial Act.

[3] Tank and Pflughaupt pleaded guilty, cooperated with the government, and are not involved in this appeal.

purpose of storing and distributing a controlled substance. Finally, Count 13 sought the forfeiture of Wiley's business. Holub entered a conditional plea of guilty to Counts 1, 4, 6, and 8, reserving the issue of whether the first indictment should have been dismissed with prejudice under the Speedy Trial Act. Wiley went to trial and was convicted by a jury of Counts 7, 10, 11, and 12. The Court sentenced Wiley to 188 months' imprisonment, three years' supervised release, an $83,200 fine, and a $50 special assessment on each of the four counts. The jury also found that his business was forfeitable. These appeals followed.

II.

Wiley first contends that the District Court erred in denying his motion to dismiss the indictment because the government used immunized statements against him in violation of the immunity agreement between him and the government. Wiley argues that Agent Badger told him that the information he provided would not be used against him. The government claims that Agent Badger told Wiley that the information he provided would not be used to formulate additional criminal charges against him—that is, in addition to charges about which the government already had information—but would be provided to the Court as part of the relevant conduct for sentencing. After a two-day hearing on the issue, the District Court believed the government as to the substance of the agreement and held that enough information existed before Wiley gave his statement to charge him with the four crimes charged in the indictment. The Court also held that the government did not use information provided by Wiley to formulate additional charges. We are persuaded neither that the Court's finding as to the substance of the agreement is clearly erroneous nor that its holding regarding the use of that agreement is in error.

A.

On the substance-of-the-agreement issue, Wiley argues that since agents Knott and Noonan testified that the standard procedure at that time was to grant full use of immunity, the District Court's finding believing Agent Badger is clearly erroneous. We disagree. As a preliminary matter, we note that it is very difficult to prove that a court's assessment of credibility was clearly erroneous when that court, not this Court, had the opportunity to observe and listen to the witnesses. Agent Badger, not Captain Noonan or Lieutenant Knott, was responsible for conveying the terms of the cooperation agreement to Wiley. Knott was not even present when this was done, and Noonan admitted that he did not know the details of the agreement. We see no clear error. Wiley's contention that written agreements between the United States Attorney's Office and other defendants contained different terms also does not convince us that the District Court's finding with regard to Wiley's oral agreement is clearly erroneous. There was no written agreement between the government and Wiley, and certainly no overwhelming evidence that the government would treat Wiley, an arguably bigger fish, as it treated these other defendants.

B.

On the use-of-the-statement issue, Wiley points to the following "uses" of his statement in violation of the immunity agreement: the government used his statement to induce Pat McMickle to testify; the government used his statement in formulating its strategy before the grand jury and at trial, determining which witnesses to call, deciding what evidence to present to the grand jury, and shaping its theory of prosecution; the government failed to prove that its evidence was obtained independently of the statement; and the government told the grand jury that Wiley made a statement admitting his guilt and later withdrew his cooperation. We reject Wiley's contentions.

First, McMickle had already decided to cooperate and implicate Wiley before he learned that Wiley had provided information on him. In fact, McMickle gave information on Wiley before Wiley was even arrested or questioned. In any event, the proof is substantial that McMickle's motive for assisting the government was solely to reduce his own sentence. Trial Transcript 722-23. Second, after an exhaustive review of the Motion to Dismiss Hearing Transcript and the Trial Transcript, we affirm the District Court's holding that there was abundant evidence gathered by the government through independent means, precluding us from concluding that the government's use of Wiley's statement in shaping its case, if it did so, had any effect on Wiley's substantial rights.

Next, we reject Wiley's claim that the government did not prove that the trial testimony of each witness was derived from a wholly legitimate, independent source. In rejecting this claim, the District Court explained that the argument ignored the nature of the agreement. We agree. The agreement here was not that the government would not use Wiley's statement, but that the government would not use Wiley's statement to formulate additional charges against him, and it didn't. Had the government brought charges in addition to the four charges supported by the evidence on February 22, 1988, it would have had to prove that the new charges were based on evidence that was derived from a "legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972). Here, there was no requirement that the government prove this. In any event, we agree with the District Court that the transcript of the Motion to Dismiss Hearing shows that the burden would have been met. See Motion to Dismiss Hearing Transcript 59-62, 75, 80-81, 100, 118, 194, 219.

Finally, Wiley contends that his statement was used at the grand jury when the government—by suggesting that Wiley had given a statement and then stopped cooperating—basically told the grand jury that Wiley had admitted his guilt. We do not

agree with Wiley that this was a prohibited use of his statement. A member of the grand jury asked Agent Weisman why he was terminating the investigation into Wiley's suppliers. Agent Weisman's response was "it's just getting old and people really do start forgetting things and it starts to get more difficult to conduct an investigation." Grand Jury Testimony of Agent Weisman 6. An assistant United States Attorney then interjected that Wiley was approached with the possibility of cooperating and providing information on his sources, but that he eventually decided not to cooperate. *Ibid.* Weisman agreed and said "[h]e was debriefed on a day that he was confronted with the deal, and he provided some information, and then he got an attorney, and ... stopped cooperating." *Id.* at 6-7. While we have doubts about this tactic on the part of the government, it is not a prohibited use of Wiley's statement. The substance of the agreement was not brought to the attention of the grand jury, nor was the statement used to formulate additional charges against him.

III.

Wiley's next contention is that the District Court erred in denying his motion to suppress the evidence seized from his business. He claims that the seizure was tainted by the prior interrogation of him in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We agree with the District Court that a violation of *Miranda* occurred. The police handcuffed Wiley, took him to a motel room, and questioned him without reading him his rights as required by *Miranda*. That, however, is not the end of the analysis.

In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Supreme Court rejected a fruit-of-the-poisonous-tree argument and held that a second confession, given after a proper *Miranda* warning, was admissible, although it came on the heels of an unwarned statement. The Court distinguished presumptive coercion, resulting from the absence of *Miranda* warnings, from actual coercion, resulting from

improper police behavior. Unwarned statements, explained the Court, may be voluntary in fact. *Id.* at 307, 105 S.Ct. at 1292. If the unwarned statement was voluntary, and the allegedly tainted second statement was also voluntary, the second, warned statement is admissible. The Fifth Amendment, stated the Court, prohibits only the use of compelled testimony. *Id.* at 306-07, 105 S.Ct. at 1291-92.

Indirectly relying on *Elstad*, on facts similar to those here, this Court upheld the suppression of physical evidence obtained from a consensual search following an unwarned statement. See *United States v. Carter*, 884 F.2d 368 (8th Cir.1989). The Court reasoned that the government failed to prove that the consent was voluntary. We assume that if the Court had found the consent to be voluntary, the alleged "taint" would not have prevented the Court from admitting the evidence. By analogy to *Elstad* and *Carter*, the evidence seized here was admissible if both the unwarned statement and the consent to search were voluntary. The District Court's holding that they were is not clearly erroneous. The agents uncuffed Wiley in the motel room, told him he could consult with an attorney, and explained to him the benefits of cooperation. He chose to give a statement. For these same reasons, plus the fact that Wiley signed a consent-to-search form after having it explained to him, and the fact that during the search he gave the agents all of the inculpatory evidence, we agree with the District Court that Wiley consented to the search. We do not believe this consent was tainted by the earlier *Miranda* violation.

We also reject Wiley's related claim that the District Court erred in denying his motion to suppress evidence that he turned over his notebook to the police. The notebook contained records of his drug transactions. The argument is that his act of turning over the notebook was testimonial in nature, that is, "the notebook exists and it belongs to me." Since the agents did not first give the *Miranda* warnings, this testimony, argues Wiley, must be suppressed. This is the first time Wiley has made this specific objection. Before, he merely included the notebook in

his objection to the search generally. The point is therefore not open for normal review on appeal, and we see no plain error in the ruling of the District Court.

IV.

Wiley's next contention is that the District Court erred in denying his motions to voir dire the jury, preserve the jurors' notebooks, and declare a mistrial because of juror misconduct. Apparently, several jurors were overheard mentioning the materials compiled by the government to comply with *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), which requires the government to make available to the defense statements made by government witnesses. When the judge explained that the jurors could send him a note if they needed to speak with him about anything, one juror sent a note asking what the *Jencks* files were, if the jury could see them, and what happened to Exhibit 68. Trial Transcript 615-16. Another juror asked the courtroom clerk what Exhibit 68 was and said "we've been trying to figure it out." Trial Transcript 607-08. Wiley moved for a mistrial and also requested the Court to voir dire the jury. Finding no reason to believe that the jurors had been discussing the merits of the case, the Court decided to give a cautionary instruction rather than grant Wiley's motions.

The parties do not dispute that a district court has broad discretion in handling allegations of juror misconduct. See, *e.g.*, *United States v. Baker*, 855 F.2d 1353, 1361 (8th Cir. 1988), *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818, 98 S.Ct. 58, 54 L.Ed.2d 74 (1977). We will not reverse its determination of whether there has been misconduct, and if so, its actions in handling the matter, absent an abuse of discretion. We see no abuse of discretion here.

V.

We next address Wiley's contention that there was insufficient evidence to establish that his business facilitated the crimes and that, therefore, this Court must reverse the forfeiture. While Wiley concedes that the evidence established a sufficient connection between the physical property and the criminal activity, he argues that there was no evidence that the actual business operation was used to commit or facilitate any crimes.

Our standard for reviewing the jury's finding of forfeiture is whether, in the light most favorable to the prosecution, any reasonable jury could have found the property forfeitable beyond a reasonable doubt. See *United States v. Cook*, 972 F.2d 218, 221 (8th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 991, 122 L.Ed.2d 142 (1993). The evidence here showed that McMickle, one of Wiley's main marijuana distributors, worked for Jeff Wiley Enterprises. One could certainly infer that this employment situation facilitated their contacts for redistribution activities. McMickle also called the business from Wisconsin to discuss a drug transaction. In addition, the business had many legitimate customers, thus providing a cover for the drug traffickers who frequented the business. We uphold the jury's verdict of forfeiture.

VI.

We now address Holub's contentions that the District Court erred in denying his motion to dismiss on the basis of a violation of his Sixth Amendment right to a speedy trial and in dismissing without prejudice the charges against him because of the government's violation of the Speedy Trial Act, 18 U.S.C. §§ 61, 3162.

Holub was indicted on December 14, 1988, and the trial, initially scheduled for February 28, 1989, was postponed by order of the magistrate judge on February 27, 1989. The reason for the continuance was that the government and Holub's attorney, Stanley Roush, thought—albeit incorrectly—that they had reached a plea agreement. Negotiations continued through

the fall of 1990. Apparently, the government sent a plea agreement to Roush in March of 1989 for Holub's signature. Holub told Roush that he rejected the offer, but Roush did not tell the government of the rejection until April of 1990. Roush explained that the delay was caused by Holub's telling him that he had personally called the United States Attorney's office to reject the offer and his informing Roush that he wanted a court-appointed attorney and a trial. Roush also knew that Holub had been receiving legal advice from an attorney in Washington, D.C. For the government's part, it failed to monitor the situation diligently. When the government finally learned in April 1990 of Holub's rejection of its offer, it made another offer through Roush, which Roush communicated immediately by letter to Holub. Holub did not respond. Finally, the government set a deadline of September 13, 1990, after which it would ask the Court to set the matter for trial. After receiving no response to his letters to Holub, Roush withdrew as counsel. The Court appointed new counsel and set the trial for March 19, 1991. The new counsel withdrew, and another attorney was appointed on February 8, 1991.

On February 20, 1991, Holub, through his third attorney, moved to dismiss the charges against him on the ground that the government had failed to bring him to trial within the time required by the Speedy Trial Act. He also moved for a dismissal under the Sixth Amendment. The magistrate judge found no Sixth Amendment violation, but recommended that the charges be dismissed with prejudice because of the government's violation of the Speedy Trial Act. The District Court agreed that the Act had been violated, but on March 31, 1991, dismissed the charges without prejudice.

On September 26, 1991, the government reindicted Holub. The District Court adopted the magistrate judge's Report and Recommendation finding that Holub had suffered no prejudice from the delay and denied his renewed motion to dismiss with prejudice on speedy-trial grounds. Holub then entered a con

ditional guilty plea to four counts. He now appeals from the denial of his motion to dismiss.

A.

First, Holub's claim that the District Court erred in denying his motion to dismiss based on the Sixth Amendmentis not properly before us. Holub's conditional plea of guilty merely preserved his right to challenge the District Court's failure to hold that the charges from the first indictment should have been dismissed with prejudice under the Speedy Trial Act, thereby precluding the charges in this case. Government's Appendix 142. He did not preserve or raise the Sixth Amendment issue in his plea or before the court below. Federal Rule of Criminal Procedure 11(a)(2) specifically provides that a defendant may enter a conditional plea of guilty

> [w]ith the approval of the court and the consent of the government . . . reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. . . .

Since the only written reservation concerned the Speedy Trial Act claim, we will not address Holub's Sixth Amendment claim.

B.

Second, Holub argues that the District Court should have dismissed the first indictment with prejudice instead of without prejudice. Thus, he argues, the government should have been precluded from bringing the charges against him here.

When a district court finds a violation of the Speedy Trial Act, dismissal is mandatory. 18 U.S.C. § 3162(a)(2). The Act does not, however, require dismissal either with or without prejudice, and we will not disturb the District Court's ruling on the issue absent an abuse of discretion. *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir.1987). The Act sets out the following factors for a court to use in determining whether to dismiss with or without prejudice:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a)(2).

The District Court held that the charges against Holub were serious. Addendum to Holub's Brief 29. The Court also found that the cause of the delay was the government's failure to follow up on its proposed plea offers and Holub's failure to communicate his rejections of the offers to the government. *Ibid.* The Court further found that Holub had not been prejudiced by the delay and that the government had no history of delaying trials in that area. *Id.* at 30. For those reasons, the Court held that dismissal without prejudice was appropriate. Its holding is not an abuse of discretion.

VII.

Next, the defendants challenge their sentences on various grounds. One of Wiley's contentions—that hearsay introduced at the sentencing hearing violated his right of confrontation under the Sixth Amendment—was disposed of by our decision in *United States v. Wise*, 976 F.2d 393 (8th Cir.1992) (en banc) (holding that the Confrontation Clause does not apply to the sentencing hearing), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1592, 123 L.Ed.2d 157 (1993). His second contention is that the basis the Court used to calculate the drug quantity when determining his base offense level was arbitrary, unreliable, and unrelated to the crime of which he was convicted. The sentencing court may take into account drugs not specified in the counts of conviction if those drugs were "part of the same course of conduct or common scheme or plan." U.S.S.G. § 1B1.3(a)(2). Furthermore, the quantity need be established only by a preponderance of the evidence, and we will not reverse the sentencing court's determination of drug quantity unless the

defendant proves that determination is clearly erroneous. Wiley has not done that here.

Wiley claims that there was no evidence at the sentencing hearing to prove that the marijuana distributed by Don Raymond and Kevin Meggers was obtained from him. The government did, however, present evidence at trial that Wiley was the source of this marijuana. Trial Transcript 308, 579-80, 589-90, 834, & 881-83. Most of the drug-quantity evidence came in the form of testimony from Patrick McMickle, who Wiley claims was addicted to cocaine during the relevant time period and is completely unreliable. The District Court disagreed, and found McMickle to be a credible and reliable witness. We are not persuaded that the Court's finding on this issue is clearly erroneous.

In addition, we see no merit to Wiley's claim that the District Court erred in enhancing his offense level by two levels for obstruction of justice. The District Court believed the witnesses' testimony that Wiley threatened them with physical harm if they testified, and, once again, we cannot say this finding is clearly erroneous. Such a threat is clearly sufficient to justify the enhancement.

Finally, Holub challenges the two-level increase in his offense level under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm. He does not contend that he did not possess a firearm, but that the government did not prove the firearm was connected to the offense. Mottinger, a wired government informant, went to Holub's house to discuss a marijuana deal. When the two of them entered Holub's bedroom, Mottinger noticed a 9-millimeter gun in an open gun safe near the bed. We will assume that Holub is correct that the gun was not loaded, although he testified that he could load it and be ready to fire it in four or five seconds. In any event, Mottinger handled the gun for a moment, and then Holub returned it to the safe. A few minutes later, they went back to the living room, where Holub gave Mottinger the marijuana sample.

Holub argues that the enhancement does not apply since the gun had nothing to do with the drug transaction and was not even in the room where the transaction occurred. We agree that the gun was not involved in the sense that Holub did not directly threaten Mottinger with it to consummate the sale. The question here, however, is whether it is "clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, Application Note 3. The District Court's finding that it was not clearly improbable is not clearly erroneous. See *United States v. Streeter*, 907 F.2d 781, 792 (8th Cir.1990) (court upheld enhancement where unloaded guns were found on ground floor and marijuana found in attic); *United States v. Haren*, 952 F.2d 190, 198 (8th Cir.1991) (court upheld enhancement where guns were found in mobile home adjacent to sheds which served as the amphetamine labs).

VIII.

Finally, defendants have submitted a portion of their briefs under seal, together with excerpts from the transcripts and related materials. We have considered the arguments made under seal with care. They are serious arguments. After considering all of the relevant factors, we hold that no error occurred affecting defendants' substantial rights.

The judgments are affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs. No. CR 92-2469

JEFFREY WILEY,
Appellant.

AFFIDAVIT

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, STEPHEN J. CHIULLI, first being duly sworn, hereby depose and state as follows:

1. I am a licensed clinical psychologist practicing in the state of New Mexico (see Curriculum Vitae attached hereto as Exhibit A).

2. At the request of Nancy Hollander, Esq., attorney for appellant Jeffrey Wiley, I have examined certain excerpts from the transcript of the proceedings below (attached hereto as Exhibit B) in order to evaluate whether Judge Donald J. Porter was competent to preside over the proceedings.

3. First, as part of a neuropsychological evaluation, the verbal production of a client is examined, as it can be a very sensitive way to evaluate aspects of a client's intellectual functioning. Such examination of verbal output is only part of a complete evaluation, however, which, while able to indicate problems in brain function, is not sufficient to identify the etiology or cause of the problems. To make such a determination, a thorough medical evaluation and complete neuropsychological evaluation would be required. Thus, I offer

the following as a preliminary impression based on the data available:

a. Two major problems in cognitive functioning appear to occur consistently throughout the transcripts I reviewed. These problems are likely to have a negative impact on the judge's ability to adequately process the material presented to him in any form. The most frequent problem appears to arise in the very frequent pauses seen in the transcript, which appear to reflect a serious difficulty in word finding. For example, introductory phrases occur in a normal manner but as the specific topic is reached in a sentence a pause occurs and it appears necessary to begin the sentence again. This is a problem that we see with individuals that have difficulty retrieving specific words and try to compensate for that problem by "circumlocution" (literally to speak around the item).

b. The second problem seen on the transcript appears to reflect memory difficulties separate from word retrieval. The best example of this occurs on page 523 of the transcript in which there is an extensive dialogue involving exhibits. While the sample is too small for definitive conclusions, there is some evidence of both failure to recall specific material and at least one example of "mis-remembering" something (incorrect information is recalled in the place of the material specified).

c. Based on the material presented in these transcripts, I would strongly advise that the individual identified in the transcript as "the Court" seek immediate medical attention. There are a variety of medical problems that could cause the difficulty noted above, some of which require rapid medical intervention. It is impossible to know from the transcript whether the speaker is aware of these problems or not, and in my experience this is a very individual matter. Some people may develop these problems gradually and have relatively little awareness of their difficulty.

d. Depending on the results of the medical evaluation, further assessments may be indicated. This might include neuropsychological evaluation or careful examination by a

Speech and Language Pathologist. These assessments are usually needed to determine the impact of the difficulties on day to day or vocational functioning.

Further, affiant sayeth naught.

/s/ Stephen Chiulli
STEPHEN J. CHIULLI, Ph.D.

SUBSCRIBED AND SWORN TO before me this 27th day of August, 1992.

/s/

My Commission Expires:
6/19/95

EXHIBIT A

CURRICULUM VITAE

STEPHEN J. CHIULLI, PH.D.

Address:

Work: Neuropsychology Associates, P.C.
5801 Osuna N.E.; Suite 207
Albuquerque, New Mexico 87109
Telephone: (505) 889-0426

Home: 24 Garden Park Road NW
Albuquerque, New Mexico 87107
Telephone: (505) 345-3020

Personal Information:

Date of birth: February 3, 1950
Place of birth: Brockton, Massachusetts
Social Security: 018-38-0624

Education:

Ph.D.: 1991 University of New Mexico
Department of Psychology, Clinical Psychology,
Albuquerque, New Mexico

M.S. 1986: University of New Mexico, Department of Psychology, Albuquerque, New Mexico

B.S. 1981: University of Massachusetts, University Without Walls, Amherst, Massachusetts

Experience:

6/91 to present: Psychologist, License #500, New Mexico
9/87 to 5/30/91: Associate, Neuropsychology Associates, Albuquerque

3/88 to present: Consultant, HEALTHSOUTH Rehabilitation Center, Albuquerque

9/86 to 8/87: Predoctoral Internship in Neuropsychology, West Haven VAMC

5/84 to 5/85: Co-therapist, Multiple Sclerosis Support Group

2/84 to 1/86: Co-therapist, Psychotherapy Group, University of New Mexico, Department of Psychology Clinic

2/84 to 1/86: Therapist, Individual Psychotherapy, University of New Mexico, Department of Psychology Clinic

5/83 to 9/83: Neuropsychology Practicum, Summer Intern, VAMC, Albuquerque

9/83 to 4/86: Neuropsychology Technician, VAMC, Albuquerque

1/83 to 7/86: Neuropsychology Technician, Albuquerque Psychology Consultants

Spring 1984: Teaching Assistant, University of New Mexico, Introduction to Neuropsychology

1975 to 1981: Neuropsychology Technician, Veterans Administration Hospital, Northampton, Massachusetts

1970 to 1975: Psychiatric Aide, VAMC, Northampton, Massachusetts

4/74 to 4/75: Co-therapist, Psychotherapy Group, VAMC, Northampton, Massachusetts

Professional Membership:

American Psychological Association
International Neuropsychology Society
National Academy of Neuropsychologists
New Mexico Psychological Association

Research Papers:

Chiulli, S.J. (1991). *Brain mechanisms in the recovery of function*. Presentation at the annual convention. New Mexico Chapter of the National Head Injury Foundation. October.

Chiulli, S.J. (1991). *Executive processing and story recall in the elderly*. Unpublished doctoral thesis. University of New Mexico, Albuquerque, New Mexico.

Chiulli, S.J. (1990). *Anger management in the treatment of head injury*. Presentation at the annual convention. New Mexico Chapter of the National Head Injury Foundation. October.

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Research Grant:

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Revised July 25, 1991

EXHIBIT B

UNITED STATES *v.* WILEY
Criminal No. 91-0009

TRANSCRIPT OF TRIAL

United States District Court
for the Northern District of Iowa
Cedar Rapids Division

February 18, 19 & 20, 1992

The above-entitled matter came on for trial pursuant to assignment.

BEFORE: HON. DONALD J. PORTER, Judge, sitting by designation.

APPEARANCES:

PATRICK J. REINERT and STEVEN M. COLLOTON, Assistant United States Attorneys, 425 Second Street S.E., Suite 950, The Center, Cedar Rapids, Iowa 52401, appearing for the Government.

NANCY HOLLANDER, Freedman, Boyd, Daniels, Peifer, Hollander, Guttmann & Goldberg, Attorneys at Law, 20 First Plaza, Suite 700, Albuquerque, New Mexico 87102, and

NINA J. GINSBERG, DiMuro, Ginsberg & Lieberman, P.C., Attorneys at Law, 921 King Street, Alexandria, Virginia 22314, and

THOMAS J. O'FLAHERTY, Attorney at Law, 311 Higley Building, Cedar Rapids, Iowa 52401, appearing for Defendant Wiley.

Tr. 350

MR. REINERT: At the close of the evidence we feel the Court will be able to make a finding that the conspiracy discussed—that the Defendant was a member of it.

THE COURT: Last one is, I didn't read them all, that the statement was made during the course of that conspiracy—which one—In other words, are you able to can you identify this with—that the statement was made, the statement that you're eliciting—I suppose that's a statement by the declarant?

MR. REINERT: Holub's statement.

THE COURT: That was made during the course of the conspiracy of which it furthered?

MR. REINERT: And we have the charged conspiracy beginning in '85 through '88. This conversation took place in February of 1988. It was a drug-related conversation where they not only talked about distributing this pound, Holub talks about his trips to Wisconsin, which are part of the conspiracy, and he also talks about setting up a future deal and indicates that his sources have always been good on weight. So those statements regarding the scope of the conspiracy, showing that they have an ongoing operation, helping the buyer to feel at ease, are all in furtherance of the conspiracy.

THE COURT: Do you wish to be heard further?

Tr. 385-86

The consent to search on the grounds that it was tainted by the *Miranda* violation. The Government conceded that the statements were made in violation of *Miranda*, and also that the consent to search was involuntary and that the consent to search was also tainted by the immunity problem with *Kastigar*.

THE COURT: Taking out the immunity contention taking that out, what is the real—what's the new objection—not new, but one you— We haven't talked about this for quite a while. What's that one?

MS. HOLLANDER: We— The Government conceded that Mr. Wiley when he gave a statement the night of February 22nd, that the officers did not advise him of his rights under *Miranda* and the Government therefore agreed not to use his statements in any case—in their case in chief because it would have been a violation of *Miranda*. We argued and continue to allege that the consent to search which he signed was tainted. It was poisonous fruit of the statement—

THE COURT: That Mr. Wiley signed?

MS. HOLLANDER: Yes, sir, was tainted by the *Miranda*—un-Mirandized statement. He gave a statement that night without the benefit of his Fifth Amendment rights under *Miranda*, and in the course of that statement while this Officer Knott was debriefing him, he signed a consent to search form—

THE COURT: Uh-huh.

MS. HOLLANDER: —and we contend that that is tainted by the statement he gave where he didn't have his Fifth Amendment privilege.

We also contended that that consent to search was involuntary because he had no *Miranda* warnings and because he was in a hotel room surrounded by four or five officers who were telling him he should cooperate.

THE COURT: Well, I can have a hearing to determine whether he gave—whether he was—just a minute--two different things—

MR. REINERT: Your Honor, this suppression motion, we previously had a hearing in front of the magistrate, and the Court has already denied this motion.

MS. HOLLANDER: That's correct, Your Honor, but the law requires us to make that again at trial.

THE COURT: That's all right.

MS. HOLLANDER: I'm doing it now.

THE COURT: I've done that as a lawyer, so I don't mind you doing that, so you have a right to do it. So that's about it.

MS. HOLLANDER: While we're here, Your Honor, on the issue of Officer Dudley, since the Court limited our cross-examination, we will probably call him as a witness in ....

Tr. 474:

THE COURT: Okay.

(Side-bar conference out of the hearing of the jury.)

MS. GINSBERG: We would object to the admission of this evidence on the grounds that it's irrelevant to Mr. Wiley; that it's more prejudicial than it is probative, and also that it is 404(b) evidence not related to the conspiracy that is charged, and on those bases we would object to the admission of this evidence.

THE COURT: Who is 404(b)—against who?

MS. GINSBERG: This is a drug deal between Mr. Mottinger and Mr. Holub—

THE COURT: I mean, who's being—which individual is getting the 404(b) other acts against him?

MS. GINSBERG: Mr. Wiley—I assume that this is being offered against Mr. Wiley or the prosecutor wouldn't be trying to put it into evidence, but it is our contention that any transactions that occurred between Mr. Holub and Mr. Mottinger are unrelated to the conspiracy that's charged in this Indictment and therefore it would have to be 404(b) evidence, other bad act evidence.

MR. REINERT: Your Honor, this is part of the charged conspiracy. Mr. Holub on tape, as the Court has already heard, indicated that his source and his source's source—Mr. Holub will testify later that his source was Kevin Meggers. On the tape where he is talking to the agent.

Tr. 513-14:

A. Just about. Okay. Found it.
Q. And how do you spell that?
A. W-e-r-n-i-'-s Tap.
Q. Spelled like this (indicating)?

A. Yes, it is.

Q. And what is the number that you have there?

A. 362-8224.

MS. HOLLANDER: Your Honor, I'd like the clerk to mark this exhibit as Defendant's Exhibit A, and I'd move it into evidence at this time.

THE CLERK: It will be marked as Exhibit 69.

MR. REINERT: Your Honor, I believe that's just a demonstrative exhibit.

THE COURT: But it's a way to keep track of it.

MS. HOLLANDER: Your Honor, I'd like the witness to come down and initial it, and we would offer it into evidence at this time.

THE COURT: Well, ordinarily these are only for—used for the purpose of enabling the jury to follow and it's not ordinarily taken in as an exhibit, so you can use it as an illustrative method, counsel.

MS. HOLLANDER: Okay. Your Honor, I would like the—if I may ask the witness to initial the exhibit?

THE COURT: To do what?

MS. HOLLANDER: To initial the exhibit. I'm offering this into evidence as real evidence, and I'd like the witness to initial the exhibit.

THE COURT: Well, we'll have to reserve ruling on that. Please proceed.

MS. HOLLANDER: I have nothing further.

THE COURT: Now, I'd like— Can you remain there for a moment? I'd like to have counsel meet me at the bar for a brief time.

(Side-bar conference out of the hearing of the jury.)

THE COURT: I don't think I'm understanding you, I guess, but while I'm at it, it is true, it's okay with me if you mark up sheets like that, but 90 percent of the time my experience has been that it will be—it's okay to illustrate it to the jury, but I don't mark it as a permanent— What is the objection that you made?

MS. HOLLANDER: I understand, Your Honor, but since the witness has talked about this and he has confirmed the validity of this, I'm offering it as a real exhibit—

THE COURT: You're offering what?

MS. HOLLANDER: This piece of paper with his initials on it, I'm offering this as real evidence in this case, not just as demonstrative evidence, Your Honor. It's no different than the telephone—

MR. REINERT: It's still not real evidence. It's simply demonstrative, taking excerpts from evidence that is

Tr. 521

and not covered by the business records exception because although some of it may be covered, the opinions contained in it are not covered by 803(6).

In reading the *Baker* case, it does not appear—which is the case counsel cited earlier, it does not appear that the defendant raised the issue of an opinion that's not covered by 803(6). 803(6) concerns business records exceptions, but opinions are generally not included under 803(6), and this document here—

THE COURT: What's not generally included?

MS. HOLLANDER: Opinions. This document contains opinions. The witness certainly is no doubt qualified to testify to the opinions, but we object to this document being in front of the jury because it's hearsay.

THE COURT: Well, this document—Exhibit 19—

MS. HOLLANDER: Yes, sir, Exhibit 19.

THE COURT: Is it now in or not?

MR. REINERT: We have offered it, Your Honor, and rely on all the Eighth Circuit cases that indicate laboratory reports of controlled substances are in fact factual statements which fall within the business records exception. Mr. Rehberg is here for cross-examination if they want to cross-examine him about the contents of it. We would most assuredly suggest that the foundation has been laid and it is admissible.

Tr. 523

records in the past, in a number of cases, including the cases I previously cited, they are admissible as business records.

THE COURT: This is 19 and 45?

MS. HOLLANDER: 33, Your Honor.

MR. REINERT: 19, 45 and 33.

MS. HOLLANDER: These are the two I'm addressing now, 33 and 45.

THE COURT: All right. 19 and 43 (sic) you're addressing, I'll deal with that, then.

MS. HOLLANDER: I'm addressing at the moment— You've already ruled on 19, so now I'm addressing 33 and 45 together because I think the Government will probably move to admit them one after the other.

THE COURT: Uh-huh.

MS. HOLLANDER: We do—

THE COURT: Just a second. Make the offer now so that I know exactly what you're offering.

MR. REINERT: 33 and 45.

THE COURT: Which exhibits?

MR. REINERT: 33 and 45. Those are the two you have in your hand, Your Honor. Mr. Rehberg will testify, as he did with 19, that he is the director of the DCI lab; that they are required to create these documents; that they are created at or near the time the test is done; that the

Tr. 560

agreement that—that's what you'll be working up to. That is what you are entitled to show is that there's a reason for him to be favorable to the Government because his—Well, just as I already said, that under the plea agreement his cooperation is something that— Does it say that in the plea agreement?

MR. REINERT: The plea agreement does contain a potential for a 5K departure under United States Sentencing Guideline 5K1.1, which indicates that the United States may make a substantial assistance motion. It also indicates that the

district court has the discretion to make the final decision, that there's no promises with regard to the sentence to be imposed—basically that the United States will tell the Court what this witness has done, and the Court will use that information.

THE COURT: Any one of those, I don't think there's any dispute, legally, about that, and if you ask him and he says—he denies it, or something, why, then I would—you could follow up, but it's all contained within this pasture here, and it's really—you really ought to propose to me the questions you want to put to him rather than I should try to guess what you're going to do and follow you around.

MS. HOLLANDER: I'm happy to do that, Your Honor, but this goes to our theory of the defense.

THE COURT: Well—

Tr. 567

having the Government favor him, but we're not going to say how much.

MS. HOLLANDER: Is the Court ruling then? I need a ruling on this, Your Honor.

THE COURT: I'm ruling this— How we heard counsel state, at my request, counsel contended essentially, by and large, I agree with that.

MS. HOLLANDER: Is the Court then denying my request to take this witness outside the presence of the jury and do a complete proffer of the cross-examination?

THE COURT: Yes.

(The side-bar conference ended.)

THE COURT: Please proceed, counsel.

MS. HOLLANDER: Would you read my last question back? If you can't find it, I'll ask it.

Q (By Ms. Hollander) Mr. Pflughaupt, you understand, do you not, that parole has been abolished?

A. Yes.

Q. And you understand that that means that whatever sentence you get you're going to essentially serve the whole sentence except for some amount of good time?
A. Yes.
Q. And you understand that Congress has limited the amount of good time you can get, don't you?
A. Yes.

Tr. 629
impact on the jury. I respect that contention. I've thought about that, and—but I can't, as I said a minute ago—and I will let you be heard—

MS. HOLLANDER: I'll wait.

THE COURT: —is that in the first place, this is on whether it's more prejudicial than probative. I can see where it would be probative because the defense has, as I understand it, really to a considerable extent that this is—this Defendant—this Defendant is, as I understand it, is, and I don't claim—this is not the total—what it is includes a contention that the Defendant is playing the wrong man, it isn't any—and also that any acts—also there are other—this is, of course, a defense statement, not necessarily from testimony, it's from let's say when the position was made in opening statement before, but also there are—there is testimony from co-conspirators in an alleged conspiracy in which Defendant is involved in the conspiracy, and it is intended that—at least it is—by the cross-examination an impeaching of those witnesses who testified about that against Defendant would be—would go to the question of whether he had any role or if he was simply sort of a—not sufficient to be a part of the conspiracy. Now, there is a conspiracy charged in the Indictment. I'm not really giving any weight to the prosecutor's argument that there is another—another . . . .

Tr. 792

any, the role of the Defendant was, what his motive was, what his knowledge was, and what his intent was in this case. Even if you find Defendant may have committed these acts in the past, as I said, this is not evidence that he committed such acts in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. Defendant is on trial only for the crimes charged, and you may consider the evidence of prior acts only on the issue of the—for the purpose of determining Defendant's role, motive, knowledge or intent as related to the charge against this Defendant.

All right. You want to meet at the side-bar?

MS. GINSBERG: Your Honor, that's fine. I would just ask for a few minutes to review the *Jencks* material.

THE COURT: All right. Do you wish to cross-examine?

MS. GINSBERG: Yes, I do, but I'd like a few more minutes to review the *Jencks* file.

THE COURT: All right. I meant to add, I did say role, motive, knowledge and intent—or intent. I meant to add that, members of the jury, knowledge, intent, role, motive, knowledge or intent.

That completes my instruction.

Are you ready?

MS. GINSBERG: Just one more moment, Your Honor,

Tr. 868

THE COURT: Then if I were to give an instruction to the jury I'm going to give one on this similar acts anyway, but instruct the jury that—or—it isn't an instruction, but in some manner the jury could be advised that the—well, I could advise the jury that I'm only permitting—that—in some manner, this very thing, that your only contention—stipulation that the transcript is to be understood and the recording is to be understood as—it's the Government's position that they rely on the—solely on the testimony of—I don't want to just get something—

MR. REINERT: Your Honor, we would have no problem if the tape is played with the rest of the closing. If the Defendant wants that closing played, we would withdraw our objection, our hearsay objection to that portion of it, and would be willing to stipulate, pursuant to that withdrawal, that the officer placing the closing on the tape did not know Jeff Wiley's last name when the closing was placed on there. We would be willing to do that.

THE COURT: What is it you hope to prove by playing this part of the tape—just tell me straight without a lot of argument.

MS. GINSBERG: As best I can—

THE COURT: In answer to that question—

Tr. 876

going to replay it.

Anything else?

MR. REINERT: You're going to play just the final portion, Your Honor?

THE COURT: All right— That's right. I would consider more seriously playing it all, but perhaps that might tend to be—it is and it isn't. Maybe I just— In a way, I don't think it's as big as—15 minutes later I'm not sure.

Do you have anything parting?

MR. REINERT: No, sir.

MS. GINSBERG: Thank you very much, Your Honor.

(The side-bar conference ended.)

THE COURT: Have the jury come—

Ready for that or not?

MR. REINERT: Ready, Your Honor.

(The jury returned to the courtroom at 11:46 a.m.)

THE COURT: Please be seated, members of the jury.

Members of the jury, you will now hear the—a playing of the balance of the recording which you've been listening to.

MS. GINSBERG: Your Honor, it might be helpful if the jury was told that they could look at the last page so they can follow the transcript—the recording, page 44.

follow the transcript—the recording, page 44.

THE COURT: Is it single spaced on the very last

Tr. 927

Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. You should therefore rely on what you hear rather than what you read when there is a difference.

Now, also, members of the jury, I have—up to now—I guess I'll just stop there for a moment, unless— Is it the understanding that there's another—maybe if each party could—if there's no further instruction intended now, why, I'll stop.

MR. REINERT: The United States requests no further instructions, Your Honor.

THE COURT: Requests what?

MR. REINERT: We do not request further instructions, Your Honor.

MS. HOLLANDER: We do not request any further instructions, Your Honor.

THE COURT: All right. I guess it's up to the Government to go ahead.

Q. (By Mr. Reinert) Mr. Hoffman—

THE COURT: Excuse me, I didn't realize that the clerk had gone—

Q. Mr. Hoffman, you're going to have to bear with me. I'm starting to lose my voice here today, so if you don't hear what I say or what question I ask you, tell me to repeat.

Tr. 995

need to read to you.

So we will then adjourn court now, members of the jury, so you're free to go home and—but I will count on everybody being—I will count on all of the members of the jury being here ready to start by one o'clock in the afternoon.

time did we agree on? Nine o'clock.

(The trial was recessed for the day at 5:32 p.m.)

Tr. 1003-04

furtherance of that conspiracy, and that the statement was made during the course of that conspiracy. Again, I plan to file a more detailed finding spelling it out a bit more fully.

I'll go on—

MR. REINERT: Your Honor, when you listed the names off, those were the declarants, not necessarily the witness—those were the declarants of the out-of-court statements?

THE COURT: Well, that's right, the declarants were the persons making—what's your interpretation?

MR. REINERT: When you listed off the people, I assumed you meant those were the out-of-court declarants whose statements were being repeated in court?

THE COURT: Uh-huh.

MR. REINERT: And the list that I had was Tank, Holub, Pflughaupt, Don Raymond, Kris Eggers, Betty McMickle, Kevin Meggers—

THE COURT: They're the ones whose statements were being— Go ahead.

MR. REINERT: Did the Court also include Patrick McMickle as a proper member of the conspiracy so out-of-court statements would have been admitted as co-conspirator hearsay?

THE COURT: I said Betty McMickle and—

MR. REINERT: There were also some *Bell* rulings made—statements made by Patrick McMickle that were offered through other witnesses, through Betty and through Ronald Tank.

THE COURT: Well, this was filed, counsel, with the clerk, Northern District, February 26, 1992, at 1:05 p.m., and I'm reading from that, the United States' preliminary summary of the evidence, and that's where I'm reading from, the names of the—the co-conspirators identified during the presentation of this case were Jeff Wiley, Ronald Tank, Curtis Holub, Craig

of the—the co-conspirators identified during the presentation of this case were Jeff Wiley, Ronald Tank, Curtis Holub, Craig Pflughaupt, Don Raymond, Kevin Meggers, Kris Eggers and Betty McMickle. Now, if I said anything differently, I meant to say that.

MR. REINERT: I believe Patrick McMickle as well is a co-conspirator, Your Honor.

THE COURT: Who was?

MR. REINERT: Patrick McMickle.

THE COURT: Yes, that's certainly true, although his name is not entered on here—was at the time he gave any hearsay testimony—it was received under the rule I've referred to, that he was involved, because he certainly was a co-conspirator.

Now, I find it to be true by a preponderance of the evidence, as set out in the United States' preliminary summary of the evidence and the document filed on . . . .

Tr. 1006

MS. GINSBERG: Excuse me, Your Honor, will we have a chance to make objections to Your Honor's jury instructions? We have not had a chance to do that.

THE COURT: Counsel, I wrote on each one that I reviewed, I wrote "refused." I put the date and my initials and filed it with the clerk.

MS. GINSBERG: I understand that, but we have grounds for objections, and I don't want to—for our failure to state those grounds for the Court of Appeals to come back and say that we waived those objections.

THE COURT: You can file your grounds at any time. I have thoroughly reviewed them. I cannot—I don't customarily and I don't think it's any reason here that I should invite you to make an argument to me. I view the record this way, that any grounds which would be reversible error for not giving the proposed instruction you've preserved.

MS. GINSBERG: Well, the Courts of Appeals don't agree with that, as I understand it. We are required to make specific objections to individual jury instructions if they are not given and state our grounds. If the Court is saying that we can't do it now, I'll certainly abide by that and we will file a written objection.

THE COURT: All right. Let's have the jury come in.

Tr. 1049

"Under Count 2"—that's 11, Count 11, "Under Count 11, the Indictment charges that between about 1987 and 1988, defendant Jeffrey Wiley, as owner, lessee, agent, employee or mortgagee, managed or controlled a building, room—a building, room, enclosure available for use, with or without compensation, for the purpose of unlawfully storing, distributing and using a controlled substance.

"Under Count 12, the Indictment charges that defendants Curtis Holub, Crag Pflughaupt, Ronald Tank and Jeffrey Wiley, between about 1985 and 1988, committed the crime of conspiracy to distribute and possess with intent to distribute marijuana, a Schedule I controlled substance."

Earlier on this page I did refer to a Count 10— I intended to refer to Count 10, but I said Count 2, but I referred to Count 7. That's the one I took, and then the next one was Count 10. So those are on page 12. You'll have this same set of instructions typed which I'm reading to you that will go into the jury room with you and you can refer to it at your leisure.

Now, "Under Count 12, the indictment charges that defendants Curtis Holub, Crag Pflughaupt, Ronald Tank and Jeffrey Wiley, between about 1985 and 1988, committed the crime of conspiracy to distribute and possess with intent to distribute marijuana, a Schedule I controlled substance.

Under Count 7, the Indictment charges that the

Tr. 1051

under consideration by you, the defendant or some other person whom the defendant aided and abetted, as those terms are hereinafter explained to you, knowingly or intentionally transferred marijuana, which is a controlled substance, to another person; and

"2, that at the time of the transfer, the defendant knew that the substance transferred was marijuana.

"Under Count 10, the Indictment charges that Jeffrey Wiley did knowingly and intentionally possess with the intent to distribute, and did aid and abet the possession with the intent to distribute, a specified amount of marijuana, a Schedule I controlled substance, on or about February 22nd, 1988"—

Well, members of the jury, I will read what is 13 so that I put both these together.

"Under Count 7, the Indictment charges that the defendant did knowingly and intentionally distribute, and did aid and abet the distribution of a specified amount of marijuana, a Schedule I controlled substance, on or about February 22nd, 1988.

"Title 21 of the United States Code, Section 841(a)(1), the statute involved in Count 7 of the Indictment, provides in part:

"'It shall be unlawful for any person, knowingly or intentionally to distribute a controlled substance.'

Tr. 1063-64

thing is there.

"The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

"You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others."

The page I just finished reading, members of the jury, I left one and a half lines out, so I'll read it to you again.

"The law recognizes two kinds of possession: actual possession and constructive possession." The lines I left out I'm reading to you now. "A person who knowingly has physical control over a thing, at a given time, is then in actual possession of it"—I'll finish the page.

"A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. Constructive possession is knowledge of presence plus control. A person has constructive possession"—You'll recognize that I've read this part to you. "Constructive possession is knowledge of presence plus control. A person has constructive possession of a thing if the person has ownership, dominion or control over that thing or dominion over the premises where the thing is located, knowing the thing is there.

"The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

"You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others."

"The United States is not required to prove that the amount of quantity of a controlled substance such as charged in the Indictment. It need only prove beyond a reasonable doubt that there was a measurable amount involved in the count under consideration by you."

I think I'll read that again to make sure—

"The United States is not required to prove that the amount of quantity of a controlled substance was as charged in the Indictment. It need only prove beyond a

intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observations. You may consider any statement made or act done or omitted by a defendant, and all other facts and circumstances proved by the evidence which indicate a defendant's state of mind. Where intent is an element of the crime charged, it must be proved beyond a reasonable doubt.

"You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have said, it is entirely up to you to decide what facts to find from the evidence."

We'll take a 10-minute break—15, maybe, members of the jury. You'll be going out to the jury room. I'm almost through, but I'll finish that up after our break, and so remember, do not talk about the case among yourselves or with anybody else. The case has not yet been delivered to you, so you should not discuss it at all in any way with any of your fellow jurors, and so this is just a short break so that you won't have to sit there any longer, move around a little bit. So we'll notify you within 15 minutes or so.

The jury may go out.

Court is in recess.

(The trial was recessed at 6:07 p.m. and reconvened again at 6:33 p.m.)

THE COURT: Have the jury come back.

Please be seated, members of the jury.

Continuing, members of The jury.

"Count 11 charges that defendant Jeffrey Wiley did manage and control a building made available for the storage of controlled substances and aid and abet the management or control of a building, room or enclosure which was available for the storage, distribution or use of a controlled substance.

"The essential elements of this offense are: 1. Jeffrey Wiley managed or controlled the building, room, or enclosure at 3615 Third Avenue, Marion, Iowa; 2. either as owner, lessee, agent, employee or mortgagee; and 3. knowingly and intentionally rented, leased, or made available for use the building, room, or enclosure for the purpose of unlawfully storing, distributing, or using a controlled substance.

"You have heard evidence that the defendant previously committed acts similar to those charged in this case. You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged here,

Tr. 1072-74

transcripts may be caused by such things as the inflection in a speaker's voice. You should, therefore, rely on what you heard rather than what you read when there is a difference."

MR. REINERT: May we approach, Your Honor?

THE COURT: Yes.

(Side-bar conference out of the hearing of the jury.)

MR. REINERT: Your Honor, with regard to Count 11, we've—you've correctly laid out the elements of the offense, but, of course, the jury has to be instructed--

THE COURT: 10 or 11?

MR. REINERT: Of 11.

They have to know beyond just the elements. If the Government has proven it beyond a reasonable doubt, then they have to find him guilty. If we failed to do so, they have to find him not guilty. So I took the standard last paragraph off a number of other instructions and wrote it out and passed it to your law clerk and showed it to defense counsel, so they've had an opportunity to see it. You can go back—That is the last paragraph out of the instruction you read on Instruction 10, I think is where I copied it from.

THE COURT: I don't really— This relates to Count 11?

MR. REINERT: Yes, Your Honor.

THE COURT: I did read something on that— What part do you suggest this be done?

MR. REINERT: The only part you have done on part (sic) 11, you have informed them of the elements of the offense. The next step in the instruction is to tell the jury if the Government has proven those three essential elements beyond a reasonable doubt, that they must find the defendant guilty of the offense. If, however, that the United States has failed to prove any one of those essential elements beyond a reasonable doubt, they must find the defendant not guilty.

THE COURT: Uh-huh.

MR. REINERT: So simply that paragraph needs to be added to that instruction to make it complete.

THE COURT: All right. Well, now I'm going to ask the marshal to take the jury to eat as soon as I get done reading these. When they're gone, you can make any objections on the record you want to to any of the instructions I've given.

MS. GINSBERG: Your Honor, could I say one thing? Rule 30 of the Federal Rules of Criminal Procedure requires specifically, and I just checked it, that we make any instruction (sic) before the jury leaves—any objection we have to the instruction before the jury is excused to deliberate, and I want to be sure that we be given the chance to make the instructions (sic) so that we're following the rule. The rule—

THE COURT: Yes, that's right. You see, I don't hesitate if there's something I want to change, when they come back, I'll tell them I'll change them if I have to read them all over again.

(The side-bar conference ended.)

THE COURT: What was the number of the last one read?

Now, members of the jury, I did read the instruction relating to Count 11 to you, but I'll just read that to you again, then I'll add something to it I didn't have before.

and control a building made available for the storage of controlled substances and aid and abet the management or control of a building, room or enclosure which was available for the storage, distribution or use of a controlled substance.

"The essential elements of this offense are: 1, Jeffrey Wiley managed or controlled the building, room, or enclosure at 3615 Third Avenue, Marion, Iowa; 2, either as owner, lessee, agent, employee or mortgagee; and 3, knowingly and intentionally rented, leased, or made available for use the building, room or enclosure for the purpose of unlawfully storing, distributing, or using controlled substances."

I had not read this part to you that I'm going to

Tr. 1080-81

over the exhibits, please.

MS. GINSBERG: Your Honor, I would like to put on the record, Rule 30 requires that I make specific objection to any portion of the instruction to which I object before the jury retires to consider its verdict and that I must make those objections distinctly and state the grounds on which the objection is made. The jury is now retired, and I have not been permitted to make those objections, and I want to be able to—

THE COURT: Counsel, of course, you were given a complete set of instructions, which I really didn't have to do, but I'm perfectly willing to hear you right now. We don't have to have everybody else here. I have to hear it, so the clerk can remain— Please start, go ahead, make your objections.

MS. GINSBERG: Your Honor, has the—have they been dismissed to deliberate? I want the record to be clear about this because I must make this objection before they begin to deliberate, so if there is an error the Court can correct them.

THE COURT: They're not going to deliberate when they're having supper.

MR. REINERT: Your Honor, the United States has no objection to having counsel's objections to the instructions being deemed to have been made before deliberations since counsel did talk about making objections specifically—any objections

did talk about making objections specifically—any objections made at this time, the United States would have no objection to that being deemed being made before deliberation.

THE COURT: You have no objection to what?

MR. REINERT: Under Rule 30, the objections to instructions need to be made prior to deliberation. Since counsel did make objection earlier, we would have no objection to counsel specifying and pulling out the specific objections at this time.

MS. GINSBERG: Your Honor, the record should reflect, though, that these objections are being made after the alternates have been dismissed.

Initially, we object to the break in the time that the instructions were given, the recess that the Court took in the middle of the instructions. For the record, I believe the instructions began to be given at 5:30 p.m. It is—It was approximately seven o'clock when the jury was excused. There were several breaks in the instructions and several times that the Court repeated portions of the instructions, which I think had the effect of emphasizing certain portions of the instructions over other portions of the instructions, and I object to that.

With respect to the instructions, the set of instructions I have been provided, I object to the

Tr. 1099

please look at the set of instructions that was given to you this morning. I would say that the main goal is to attempt to make things as clear as possible, and that's about the real reason for—

THE MARSHAL: The juror has arrived that was missing.

THE COURT: Maybe we should have all the jury come in then. I'm going to ask the marshal to take the jury to lunch.

(The jury returned to the courtroom at 10:29 a.m.)

THE COURT: Please be seated, members of the jury.

Now, all jurors are present.

It's a little bit early, perhaps, members of the jury, but sooner or later it would have to be done, and so and it will give

hoping that we will be very close to being ready to recommence the—so that the proceedings that lead up to your beginning your deliberations, but since one juror was not present in the courtroom at the time that I did advise you of this, why, I intend now to ask the marshal to take the jury for lunch.

Now, during that time you—and until the trial is over, you should not discuss the case with anyone, including your fellow jurors, members of your family, people involved

Tr. 1117

MR. REINERT: Your Honor, if I may

THE COURT: All right. You've made your record.

MR. REINERT: Your Honor, if I may comment upon that?

My recollection was when the Court made its *Bell* ruling with regards to all of the statements that it asked if counsel had objections, and it asked if counsel wanted to submit something with regard to it. That was my recollection. If I was in error and the Court didn't want anything, I apologize to the Court. I presumed it was part of what the Court desired and had talked to the Defendant, and the Defendant made some specific objections. The Court indicated it would make a more detailed ruling, and I was simply attempting to assist the Court. If the Court doesn't want to use that or won't look at it, it doesn't matter to me.

THE COURT: No, no. It's difficult really to be fully conversant with all of the aspects that have to be considered, and this is—I don't—this is—I don't consider this—in fact, the one that I was looking at when I was announcing that I was adopting that had been filed with the clerk, but it was made up by the prosecutor, and I'm certainly—if there's some part that—Well, I think your record is—of objecting is made.

MS. GINSBERG: Thank you, sir.

Tr. 1127-30

about a certain date and continuing to and including a certain date. The United States need not prove with certainty the exact

about a certain date and continuing to and including a certain date. The United States need not prove with certainty the exact date or the exact period of time of an offense charged. It is sufficient if the evidence establishes that an offense occurred within a reasonable time of the date or period of time alleged in the Indictment.

"The law places upon the Government the burden of proving the defendant's guilt beyond a reasonable doubt. There is no burden upon the defendant to prove the defendant is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict with respect to the defendant.

"The charges in this case are as follows:

"Under Count 7, the Indictment charges that defendant Jeffrey Wiley, on or about February 22nd, 1988, committed the crime of knowingly or intentionally distributing and aiding and" I'll start that again—"committing the crime of knowing or intentionally"—I'll say that—"committed the crime of knowingly or intentionally distributing and aiding and abetting the distribution of approximately 82 pounds of marijuana, a Schedule I controlled substance.

"Under Count 10, the Indictment charges that defendant Jeffrey Wiley, on or about February 22nd, 1988, committed the crime of knowingly—committed the crime of knowingly or intentionally possessing with intent to distribute and aiding and abetting the possession with intent to distribute approximately 30 pounds of marijuana, a Schedule I controlled substance.

"Under Count 11, the Indictment charges that between about 1987 and 1988, defendant Jeffrey Wiley, as owner, lessee, agent, employee or mortgagee, managed or controlled a building, room, enclosure available for use, with or without compensation, for the purpose of unlawfully storing, distributing and using a controlled substance.

"Under Count 12, the Indictment charges that the defendant Jeffrey Wiley, between about 1985 and 1988,

marijuana; 3, to knowingly and unlawfully distribute more than 50 kilograms of marijuana; 4, to knowingly and unlawfully possess with the intent to distribute more than 50 kilograms of marijuana.

"Under Count 7, the Indictment charges that the defendant did knowingly and intentionally distribute, and did aid and abet the distribution of a specified amount of marijuana, a Schedule I controlled substance, on or about February 22nd, 1988.

"Title 21 of the United States Code, Section 841(a)(1), the statute involved in Count 7 of the Indictment, provides in part:

"'It shall be unlawful for any person, knowingly or intentionally to distribute, a controlled substance.'

"Count 7 charges that the defendant violated the above statute either (1) by knowingly or intentionally distributing marijuana to another person or (2) by aiding and abetting another person in distributing marijuana. The Government need not prove that the defendant distributed marijuana and aided and abetted another person in distributing marijuana; it need only prove that the defendant committed the crime charged in Count 7 in one of the alternative ways described above.

"In order to establish that the defendant is guilty of the crime of distributing marijuana as charged in Count 7 of the Indictment, the Government must prove each of the following two essential elements beyond a reasonable doubt:

"1, that on or about the date alleged in Count 7, the defendant or some other person whom the defendant aided and abetted, as those terms of aiding and abetting" as those terms will be explained to you, but to go on— I'll just go back up to where— "In order to establish that defendant is guilty of the crime of distributing marijuana as charged in Count 7 of the Indictment, the Government must prove each of the following two essential elements beyond a reasonable doubt:

"1, that on or about the date alleged in Count 7, the defendant or some other person whom the defendant aided and abetted," knowing—intentionally believing—I already said that—aiding and abetting will be defined in a later one of these

"1, that on or about the date alleged in Count 7, the defendant or some other person whom the defendant aided and abetted," knowing—intentionally believing—I already said that—aiding and abetting will be defined in a later one of these instructions—so that "on or about the date alleged in Count 7 of the Indictment, the defendant or some other person who the defendant aided and abetted knowingly or intentionally transferred marijuana, which is a controlled substance, to another person; and

"2, that at the time of the transfer, the defendant knew that the substance transferred was marijuana.

"If the Government has proved each and all of the essential elements of Count 7 beyond a reasonable doubt, you must find the defendant guilty on that count. In order to return a verdict of guilty on Count 7, you must unanimously agree that the defendant knowingly and intentionally distributed marijuana or aided and abetted another person in distributing marijuana beyond a reasonable doubt. On the other hand, if the Government has failed to prove each and all of the essential elements beyond a reasonable doubt with respect to Count 7, you must find the named defendant not guilty on that count.

Tr. 1134-35

distribution or possession with intent to distribute more than 50 kilograms of marijuana"— I'm going to give you that again. These are the—this is the first of three essential elements on Count 12.

"The crime of criminal conspiracy to violate the narcotics laws has the following three essential elements:

"1, that between about 1985 and continuing through about 1988, two or more persons reached an agreement or understanding to commit the crime of distribution or possession with intent to distribute marijuana, or distribution or possession with intent to distribute more than 50 kilograms of marijuana. In connection with this element, it is not necessary that the defendant to have been among the original parties to the

agreement or understanding is to be carried out.

"What the evidence in this case must show beyond a reasonable doubt, in order to establish that the charged conspiracy existed, is that at least two of its members in some way or manner, or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish one of the four charged common and unlawful plans; and

"2, that the defendant voluntarily joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect. In connection with this element, you should understand that merely being present at the scene of an event, or merely acting in the same way as others, or merely associating with others, does not prove that a person has joined in an agreement or understanding. But in order to join in an agreement or understanding, as required by this element, a person does not have to know all the details of the agreement or understanding, and does not have to know the identity of all the others involved. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding; and"—

This is the third, "3, that at the time the—that the—that at the time the defendant joined in the agreement or understanding, the defendant—at the time the defendant joined in the agreement or understanding, that defendant knew the purpose of the agreement or understanding"—I'll read it—it's better if I read. This is element 2 of Count 12, so I'm reading the second element—backing up just a bit.

"What the evidence in the case must show beyond a reasonable doubt in order to establish that the charged conspiracy existed, this is Count 12, that at least two of . . . .

the crime charged in Count 12. In order to return a verdict of guilty, you must unanimously agree upon which of the four offenses was the subject of the conspiracy. On the other hand, if the Government has failed to prove each of the essential elements beyond a reasonable doubt, you must find the defendant not guilty of the crime charged under Count 12."

Well, members of the jury, you'll have these in the jury room, so you can look at them any time, but I'm reading on page 19, and I'm talking about Count 12 and I may have omitted inadvertently a few lines, and it wouldn't really—perhaps I could do this in this manner: I've already read the elements of Count 12 to you really twice, and that's what I just finished doing, and but—so I will just give you this much. Now, this relates, as I said, to Count 12, page 19.

"In order to return a verdict of guilty, you must unanimously agree—you must unanimously agree upon which of the four offenses was the subject of the conspiracy"—I already told you that just now. "On the other hand, if the Government has failed to prove each of the essential elements beyond a reasonable doubt, you must find the defendant not guilty of the crime charged under Count 12.

"To assist you in determining whether there was an agreement or understanding to commit the crime of distribution of marijuana, as required by element 1 of the instruction, you are instructed that the elements of the crime of distributing marijuana are as follows:

"1, distribution of marijuana by a person; 2, who does so knowingly and/or intentionally; 3"—no 3—

"The elements of the crime of possession with the intent to distribute marijuana are as follows:

"1, possession of marijuana by a person; 2, who does so knowingly and/or intentionally, intending to distribute some or all of it to another"—The last page I read to you was page 19. On a few of these, why, the page number didn't pick up quite in the making of the copies, but I'll go right on.

"Count 12 of the Indictment charges a conspiracy to commit four separate crimes or offenses. Specifically, to knowingly and unlawfully distribute marijuana, to knowingly and unlawfully possess with intent to distribute marijuana, to knowingly and unlawfully distribute more than 50 kilograms of marijuana, to knowingly and unlawfully possess with the intent to distribute more than 50 kilograms of marijuana. It is not necessary for the Government to prove a conspiracy to commit all of the above offenses. It would be sufficient if the Government proves beyond a reasonable doubt a conspiracy to commit one or more of the above offenses, but, in that event, in order to return a verdict of guilty, you must

Tr. 1140

he or she is as guilty of the offense as if he or she had personally committed each of the acts constituting the crime.

"A person aids and abets another in the commission of a crime if that person knowingly and willfully associates himself or herself in some way with a criminal venture, with the intent to commit the crime, willfully participates in it as something he or she wishes to bring about, and willfully seeks by some action of his or hers to make it succeed.

"Some conduct by the defendant of an affirmative character in the furtherance of a common criminal design or purpose is necessary. It is not necessary that at any specific time or mode of committing—

"Some conduct by the defendant of an affirmative character in furtherance of a common criminal design or purpose is necessary. It is not necessary that any specific time or mode of committing the offense shall have been advised or commanded, or that it shall have been committed in the particular way instigated or agreed upon.

"Likewise, it is not necessary that the principal be either convicted or identified. However, in any event, before you may convict the named defendant as an aider and abettor, the United States must prove and you must find beyond a reasonable doubt

that a crime has been committed and that the defendant aided and abetted its commission, for there can be no conviction for aiding and abetting an

Tr. 1145-46

or constructive possession, either alone or jointly with others.

"The United States is not required to prove that the amount of quantity of a controlled substance was as charged in the Indictment. It need only prove beyond a reasonable doubt that there was a measurable amount involved in the count under—was a measurable amount involved in the count"—that count, of course, refers to one of the counts contained in the indictment—"It need only prove beyond a reasonable doubt that there was a measurable amount involved in the count under consideration by you.

"The element of knowledge may be satisfied by inferences drawn from proof that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, the defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.

"It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

"Intent refers to the state of mind of a defendant and means that a person acts voluntarily, without coercion, and not because of ignorance, mistake, accident, inadvertence or other innocent reason.

"Intent is a mental state, emotion, or condition of the mind with a design, resolve or determination that the doing of an act shall be done with a certain particular purpose. As such, intent is seldom, if ever, capable of direct proof, because there is no way of fathoming or scrutinizing the operations of the human

mind. Rather, the intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observations. You may consider any statement made or act done or omitted by a defendant and all other facts and circumstances proved by the evidence which indicate a defendant's state of mind. Where intent is an element of the crime charged, it must be proved beyond a reasonable doubt.

"You may consider it reasonable to draw the inferences—You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so"—I'll just read that again.

"You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not

UNITED STATES *v.* WILEY
Criminal No. 91-0009

SENTENCING TRANSCRIPT

United States District Court
for the Northern District of Iowa
Cedar Rapids Division

June 17, 1992

BEFORE: HON. DONALD J. PORTER, Judge.

APPEARANCES:

PATRICK J. REINERT, Assistant United States Attorney, 425 Second Street S.E., Suite 950, Cedar Rapids, Iowa 52401, for the Plaintiff.

NANCY HOLLANDER, Freedman, Boyd, Daniels, Peifer, Hollander, Guttmann & Goldberg, Attorneys at Law, 20 First Plaza, Suite 700, Albuquerque, New Mexico 87102, and

NINA J. GINSBERG, DiMuro, Ginsberg & Lieberman, P.C., Attorneys at Law, 921 King Street, Alexandria, Virginia 22314, for the Defendant

Tr. 99-101

As to paragraph 61, again, that's a summary paragraph, and we object for the same reasons we objected to the substantive paragraphs before.

As to paragraphs 62, 63, 64, and 65, the defendant has no objection.

That gets us to paragraph 66. As to paragraph 66, we object, Your Honor, because the probation officer's characterization under this paragraph is incorrect. The probation officer fails to explain to the Court how this procedure

worked, and implies that the defendant withheld information from her, when, in fact, on the advice of counsel—I instructed my client not to speak with the probation officer since his case is on appeal. He could not give a statement of offense conduct.

We filled out the entire form. We provided all of the releases of information, which the probation officer failed to state to the Court, and I just want the Court to know that, because it's important for the Court to know that he has not obstructed the probation officer, except he has failed to provide information which, in his counsel's view, he shouldn't provide because his case is on appeal.

He could not discuss with her the offense, obvicusly, because his case is on appeal. He could not voluntarily discuss assets, et cetera, because there is a forfeiture provision. Other than that, he did give her the information, and we signed all of the releases she requested, and I simply want to state that for the record so that the Court knows that we did cooperate with the probation office to the full extent that he could, up until where that would conflict with his Fifth Amendment right.

THE COURT: Well, I'm not very hopeful on that. He has a right— He doesn't have to speak to the probation officer, and I can't penalize him for doing it, but he doesn't earn something that would be like an extra credit, for instance, by—if he elects not to.

And I've had a lot of those, and there's—it's pretty—you really have to be pretty definite about how you admit to the alleged offense, very close to that, and I—unless he's—if he wants to do that, it's not too late. It will never be too late until time—until sentence is imposed.

MR. REINERT: Your Honor, with regard to paragraph 66, the defendant's comments are just that. They don't really fit as an objection. They are comments that elaborate upon the paragraph. This paragraph does not give the defendant any points or take any points away. There's no score. The Court can, of course, consider those comments, along with the rest of the presentence, but the Court need not resolve that particular

objection because it would have no impact upon the sentence under the rule.

THE COURT: He could do what?

MR. REINERT: You don't have to resolve this particular objection on this paragraph because the defendant's objection doesn't make any difference on the sentencing.

THE COURT: Uh-huh. Well, also, I probably— Well, it's the guidelines— There's quite— I think there are a fair number of court of appeals, Eighth Circuit Court of Appeals, rulings on this particular one, because it's an attractive opportunity that quite a few parties have chosen to endeavor to qualify for, but certainly I'm going to carefully consider it, but he doesn't have to do it, that's for sure, but failure to do it, he doesn't qualify, as the way it's been held in quite a few cases.

MS. HOLLANDER: Your Honor, as to paragraphs 67 through 88, we have nothing to add that isn't on the—on our objections. We basically didn't object except to one characterization in there.

This gets us up to paragraph 88A, which was the addendum, which has to do with the finances, and at this point, just so the Court knows what we're doing, the probation officer used some records that were seized, and Ms. Ginsberg is now going to discuss the issues relating to paragraph 88A, because that really goes to whether or not the Court is going to impose a fine.

Tr. 123-24
(D-Wiley-Direct)

THE COURT: Well, I wonder if this is going to turn out to be valuable to show the current value of—and where they are, and all these other things, that—

MS. GINSBERG: No. What this shows— Your Honor, the probation officer concluded in the presentence report that these bonds were owned by Mr. Wiley. His brother h: indicated that the bonds were not ever owned by Mr. Wiley. They are bonds that belong to his grandmother, and we, in fact,

sold in his grandmother's name, that these are not his bonds and they are not assets.

THE COURT: Whose are they?

MS. GINSBERG: They are his grandmother's.

THE COURT: Well, it isn't of direct interest to me, but it's just I'm—if this is an issue to raise that there's nothing to be seized, well, I don't—I'm not anxious to get into that, but if there is anything to be offered, it might as well be something that it will solve the question, if possible: yes, there is; no, there isn't.

MS. GINSBERG: Well, Your Honor, this is offered to show that Mr. Wiley has no assets from which a fine could be paid. The Government takes the position that he owns these bonds.

THE COURT: Yes. I took it it would be for that purpose, and that's why I think the best evidence of ownership of those—of anything—I don't know what— If the Government wants to admit it, I don't care, but—

MR. REINERT: Your Honor, if I might, may I see those?

We would have—I would have to review these documents. I've never seen these documents before. We have documents on Franklin Real Estate, and these types of funds, that were seized from Mr. Wiley's place of business that indicate he owns these and owns similar investments in his own name.

These are documents that relate to the same investment funds, some of which are owned in Hazel Patten's name. These documents aren't relevant. The documents with the defendant's name on, where it's— For instance, the Franklin Real Estate Income Fund, we have a document that was seized pursuant to the search warrant which indicates that Jeffrey Wiley owns those—owns some of that fund.

The fact that Ms. Patten, the grandmother, may own similar investments, or that the defendant similarly invested as —

his grandmother is not relevant. Those documents are not relevant with regard to these sentencings.

MS. GINSBERG: Your Honor, I would like to explain why they are relevant. The Government has chosen up to

Tr. 152
(Choate—Direct)

MS. GINSBERG: But, Your Honor, he is offering these for you to rely on in making a determination about what, if any, fine you should impose, and we don't think that the Court has—should be able to consider these documents based on the objections we've made.

THE COURT: I know that. That's why—Well, no. I think they're entitled to have them received in evidence just the same as yours. I think they were as equal, if not more up to date and more accurate, but I thought that—I didn't really feel that it was necessary for me to be too strict about it, so I let all of your documents in, even though I don't know whether you could really know for sure what the right—today's facts are as far as any property, any real estate, any securities.

Anyway, no need for me to visit with you like this, and so they're received in evidence, and if there's any pending motion, it's, for the time being, denied.

(Government's Exhibits 11 through 27 were received in evidence.)

BY MR. REINERT:

Q. Very briefly, Officer Choate, could you take the Court through those exhibits and, just for the record, say what the exhibit is?

A. Okay. No. 11 is a certificate of ownership for Inland Land Appreciation Fund, L.P., to Mr. Jeffrey S.

Tr. 169
that is at least sufficient to pay the costs to the Government of any imprisonment, probation, or supervised release ordered."

"The Court imposes an additional fine amount of $68,400, which the Court believes is sufficient to pay the cost of the defendants's imprisonment and supervised release.

"It is difficult to estimate the defendant's net worth, because he provided no information regarding his assets and liabilities. Any information available has been obtained through seizure of the defendant's financial records with little explanation from him as to their meaning. However, it is known defendant has substantial assets on the family farm he inherited and his numerous investments.

"Based on this information, the Court does believe the defendant has an ability to pay a base fine of $17,500 combined with a fine—combined with a fine to pay the costs of imprisonment and supervised release in the amount of $64,800. The total combined fine imposed for counts 7, 10, 11, and 12 is $82,300.

"The special assessment for the witnesses, any victims' fund payable under that law is $200 payable immediately.

"Supervised release: Court places defendant on a

UNITED STATES *v.* HOLUB
No. 91-0009

SENTENCING TRANSCRIPT

United States District Court
for the Northern District of Iowa
Cedar Rapids Division

June 18, 1992

BEFORE: HON. DONALD J. PORTER, Judge.

APPEARANCES:

PATRICK J. REINERT, Assistant United States Attorney, 425 Second Street S.E., Suite 950, Cedar Rapids, Iowa 52401, for the Plaintiff.

JOHN WESLEY HALL, JR., ESQ., 523 West Third, Little Rock, Arkansas 72201, for the defendant.

Tr. 78-81

their prison wages should be more than enough to pay the cost taxed upon them, as well as the special assessments."

The average inmate presently earns $48 per month, and each year prison wages are increased. Some inmates earn as much as $300 a month, so at $43 a month, a fine of $25 is less than 50 percent, and it allows the defendant—it gives the defendant an incentive to join the Inmate Financial Responsibility Program, which 85 percent of the prisoners do join, and allows them to earn other job skills in addition to giving them the opportunity to earn money which they can use both within the facility, as well as in their prisoner account for when they are released.

THE COURT: Now, am I understanding that your motion or suggestion pertains to his earning money in incarceration?

MR. REINERT: Yes, Your Honor. The Bureau of Prisons operates a program wherein defendants will make furniture and perform other tasks, and they are paid a wage when they are in prison by the Bureau of Prisons.

THE COURT: Oh, I'm not sure that it's a necessary part of the sentence at this time, even if I am open to that suggestion, or at least— I'm not— I really have not had occasion to enter a sentence up to now that covered it. It hasn't been brought to my—

MR. REINERT: Well, Your Honor, pursuant to guideline 5E1.2, it dictates that the Court shall impose a fine in all cases, except where the defendant established that he has an inability to pay or is not likely to become able to pay.

THE COURT: Yeah.

MR. REINERT: The Bureau of Prisons financial responsibility program shows that the defendant will have the ability to pay a nominal fine, and the payment of those nominal fines is important in that it will assist the defendant in giving him an incentive to join that program, which will earn him money not only to pay that fine, but also money that he can use to better himself, to pay his mailing costs for his college courses, and things of that nature, so it is a good program to start, and a nominal fine of $25 a month is not crippling in that he won't earn any money for himself. He'll be earning money for himself as well.

THE COURT: Well, I could do this: If I decide to grant the motion, that can be—and, of course, the sentence I will be signing some several days after it's prepared, because it normally takes that long to prepare it, so if I announce the sentence, I will include in the acceptance or—of your motion, and that can be then included in the sentence, which is the official sentence.

Do you see any reason why that could not be done?

MR. REINERT: That the Court would include the fine in the—in its announced sentence, and that it will be spelled out in the judgment commitment order as to what the fine is and the payment plan? That would not be a problem at all.

THE COURT: Well, I think you made it clear enough what your motion is. Is there any objection?

THE DEFENDANT: No.

MR. HALL: No, Your Honor.

THE DEFENDANT: No. I'll be happy to work.

THE COURT: Well, I'll grant the motion, and that can be included as part of the sentence of the Court. However, announcing it from the bench in open court is—will be the means by which it will be included when the written sentence is prepared and signed.

Well, now, I'm ready to go ahead and impose sentence. Is there any reason why I should not do so at this time?

MR. HALL: No, Your Honor.

THE COURT: All right. Now the Court sentences the defendant to a term of imprisonment of 41 months each on counts 1, 4, 6, and 8, with these sentences to run concurrently with each other.

The Court has given consideration in the sentence to the fact that during the hearing today when the defendant was testifying at his own request, even though sometimes it almost appeared it would be against his interest the way he spoke and being very forthcoming about what he spoke of, which had to do with this case, with his own past history, and I don't refer to the matter about leaving and then getting back late. I refer to his general apprisal of himself and his conduct with not really a—not strongly attempting to dodge the fact that he was admitting misconduct.

Now, so that's why I say that I have decided to be—to take into account the fact that defendant was candid, as I've said, in his testimony during the sentencing hearing at this date.

Now, as to the fine, the Court imposes a fine of $1,000 for these offenses. The defendant's net worth is reported in the

presentence IR as a negative $4,430; however, defendant has incurred most of these debts from guaranteed student loans while he was attending Kirkwood Community College.

While the defendant is incarcerated in the Bureau of Prisons—I guess I have anticipated this, and I have it in here. While the defendant is incarcerated in the bureau of prisons, he will have the ability to earn money, which will allow him to begin payments toward a fine. In addition, he does have the ability to earn quite a bit of

Supreme Court, U.S.
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No. 93-506

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEFFREY WILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the alleged mental infirmities of the trial judge so interfered with his exercise of judgment and discretion as to deprive petitioner of due process.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 997 F.2d 378.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1993. The petition for a writ of certiorari was filed on September 27, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiracy to distribute marijuana,

in violation of 21 U.S.C. 846; distribution of marijuana and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a); and managing or controlling a building for the purpose of storing and distributing marijuana, in violation of 21 U.S.C. 856. He was sentenced to 188 months' imprisonment, to be followed by three years' supervised release. He also was fined $82,300 and ordered to forfeit real and personal property used in the drug offenses.* The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner owned and operated a motorcycle shop in Marion, Iowa, which he used to store and distribute marijuana. Early in 1988, federal agents began investigating a drug conspiracy involving Curtis Holub. On February 11, Chris Mottinger, who was cooperating with federal agents and wearing a recording device, obtained a sample of marijuana from Holub at Holub's home. A few days later, an informant recorded a conversation among himself, Kevin Meggers, and petitioner, in which they discussed petitioner's drug trafficking. Another cooperating individual recorded a conversation between himself and Meggers, in which Meggers described petitioner's drug activities. See Pet. App. 2.

On February 19, Holub sold one pound of marijuana to Mottinger and an undercover agent and negotiated a sale of another 50 pounds of marijuana, which was to occur on February 22. On February 22, Holub went to Meggers' house to get the marijuana, believing that Meggers had secured the marijuana from petitioner.

* The reference to a fine of $83,200 at Pet. App. 4 is inconsistent with the judgment of the district court. See Gov't C.A. App. 4.

But Meggers did not have the marijuana, and the 50-pound sale did not occur. At the same time, however, Pat McMickle was purchasing 82 pounds of marijuana from petitioner at his motorcycle shop. McMickle immediately resold the marijuana to an undercover agent and was arrested. He agreed to cooperate and identified petitioner as the person who sold him the marijuana. McMickle told the federal agent that petitioner had more marijuana stored in his shop. In cooperation with authorities, McMickle returned to petitioner's shop wearing a recorder and told petitioner that the expected purchasers of the 82 pounds of marijuana had not shown up. Shortly thereafter, both petitioner and McMickle were taken into custody. See Pet. App. 2.

The agents took petitioner to a motel room, told him they had seized the 82 pounds of marijuana from McMickle, and said they were interested in his cooperation in exchange for their agreement that further information provided by petitioner would not be the basis for additional charges. Petitioner agreed to cooperate and gave the agents the names of others to whom he was selling drugs and a brief sketch of their activities. In his motorcycle shop, petitioner gave the agents over 30 pounds of marijuana he had there, along with various items of drug paraphernalia and records. Although petitioner was indicted with Holub and two other co-conspirators, he was tried individually and convicted on all counts in which he was charged. See Pet. App. 2-4.

2. In preparation for his appeal, petitioner selected excerpts from 71 pages of transcript (out of more than 1500 pages in the record) that he believed showed instances of the trial judge's infirmities and submit-

ted them to a clinical psychologist, Stephen J. Chiulli, who did not personally observe or interview the judge. See Gov't Sealed C.A. Br. 71; Pet. App. 19-63. On appeal, petitioner raised numerous claims of error, including the claim—presented in a separate brief under seal—that the mental infirmities of the trial judge had deprived him of due process. In support of that claim petitioner filed an affidavit submitted by Chiulli. Pet. App. 16-18. The affidavit explained that the transcript permitted evaluation of the judge's "verbal output" and could "indicate problems in brain function," but was "not sufficient to identify the etiology or cause of the problems." *Id.* at 16. The psychologist observed that "the very frequent pauses seen in the transcript" that he examined "appear to reflect a serious difficulty in word finding" and that the examined transcript also "appears to reflect memory difficulties separate from word retrieval." *Id.* at 17. From his evaluation, the psychologist could only "strongly advise that the individual identified in the transcript as 'the Court' seek immediate medical attention" because "[t]here are a variety of medical problems that could cause the difficulty noted above, some of which require rapid medical intervention." *Ibid.* The psychologist further acknowledged that further "neuropsychological evaluation or careful examination by a Speech and Language Pathologist * * * are usually needed to determine the impact of the difficulties on day to day or vocational functioning." *Id.* at 17-18.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1-15. With respect to the claim presented in the petition (which petitioner

had presented to the court of appeals under seal), the court stated:

> Finally, [petitioner] ha[s] submitted a portion of [his] brie[f] under seal, together with excerpts from the transcripts and related materials. We have considered the arguments made under seal with care. They are serious arguments. After considering all of the relevant factors, we hold that no error occurred affecting [petitioner's] substantial rights.

Id. at 15.

ARGUMENT

Petitioner argues (Pet. 4-20) that the trial judge was so lacking in mental competence that petitioner's trial did not provide due process. That argument does not warrant review by this Court.

1. At the outset, we note that petitioner failed to raise his competency claim in the district court, even though he acknowledges (Pet. 4-5) that he was aware of the facts on which he bases the claim even before the trial began. Although petitioner asserts that he had "no * * * remedy during the midst of trial," Pet. 5, his pretrial knowledge enabled him to raise the claim even before the trial began. In any event, even if petitioner had not become aware of the problem until the trial began, the Federal Rules of Criminal Procedure provide for the replacement of a judge if he becomes disabled after a jury trial has commenced. See Fed. R. Crim. P. 25(a). Finally, to the extent petitioner was concerned about the possibility of prejudicing himself before that judge, he might have filed a motion for a writ of prohibition in the court of appeals under seal. See Fed. R. App. P. 21; Pet. 5 n.1 (indicating that

at oral argument the court of appeals suggested that it would have entertained such a motion).

Petitioner's failure to raise the claim in the trial court significantly limits the scope of review of that claim. As the government argued in the court of appeals (Gov't Sealed C.A. Br. 71), the lower courts generally have held that a closely analogous claim for disqualification of a judge for bias should be raised at the earliest moment after the relevant facts become known to the moving party. *In re Abijoe Realty Corporation*, 943 F.2d 121, 126 (1st Cir. 1991); *United States* v. *Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990); see, *e.g.*, *Phillips* v. *Amoco Oil Company*, 799 F.2d 1464, 1472 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987); *Oglala Sioux Tribe* v. *Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983). Because petitioner did not raise his claim for disqualification at the trial stage, the government argued (Gov't Sealed C.A. Br. 71-72) that the court of appeals should have declined to entertain the claim. See *American Imaging Services, Inc.* v. *Eagle-Picher Industries, Inc.* (*In re Eagle-Picher Industries, Inc.*), 963 F.2d 855, 862-863 (6th Cir. 1992); *United States* v. *York*, 888 F.2d 1050, 1056 (5th Cir. 1989); *Willner* v. *University of Kansas*, 848 F.2d 1023, 1028-1029 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989). In the alternative, the government argued (Gov't Sealed C.A. Br. 72) that, if the court of appeals were to consider the claim, petitioner's failure to raise it at the trial stage required that the judge's participation in petitioner's case be evaluated only for plain error under Fed. R. Crim. P. 52(b). See *United States* v. *Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991), cert. denied, 112 S. Ct. 2975 (1992); *United States* v. *Schreiber*, 599 F.2d 534, 535-536 (3d

Cir.), cert. denied, 444 U.S. 843 (1979). The court of appeals' conclusion that "no error occurred affecting [petitioner's] substantial rights," Pet. App. 15, suggests that the court accepted the government's argument that the plain-error standard of review was appropriate. See Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Petitioner does not argue that the court of appeals' apparent conclusion that the district judge's behavior at trial did not amount to plain error presents a question warranting review by this Court. Instead, petitioner claims that the appellate court found that "any error in the proceedings [was] harmless," Pet. 6; see Pet. 16-17, and then argues that harmless error analysis should not apply to a claim of judicial incompetence, Pet. 19-20. But there is no basis for petitioner's implicit assumption that the court of appeals affirmed petitioner's conviction because it found an error that was "harmless"; it never used that term, but instead found that "no error occurred affecting [petitioner's] substantial rights." Pet. App. 15; see *United States* v. *Olano*, 113 S. Ct. 1770, 1777-1778 (1993) (discussing differences between harmless-error and plain-error analysis). Petitioner's harmless-error contention is not presented by this case.

Similarly, petitioner's argument (Pet. 6) that the court of appeals erred by not remanding to the district court for a hearing into the judge's competence is meritless. By failing to raise his claim in a timely manner, petitioner forfeited his opportunity to develop a complete record of the district judge's competence and to have the issue resolved before the case

proceeded to judgment. Petitioner cannot take advantage of his election to see whether he achieved an acquittal at trial before raising the competency issue. See *Abijoe Realty*, 943 F.2d at 126 ("[A] party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives.") (quoting *In re United Shoe Machinery Corporation*, 276 F.2d 77, 79 (1st Cir. 1960)).

On the merits, the decision of the court of appeals that the trial judge's conduct at petitioner's trial did not amount to plain error is reasonable. The court of appeals exhaustively considered numerous claims that the trial judge had erred in a variety of rulings at trial, but concluded on the merits that each of those separate rulings was defensible. Pet. App. 4-10, 13-14. The petition does not challenge the correctness of the court of appeals' conclusions on those issues, which thus must be taken as correct for purposes of the petition. In the absence of any further record evidence of disability on the part of the trial judge, the best evidence of the judge's mental capacity is the court of appeals' conclusion that the judge's mental capacity was adequate to cause him to rule correctly on the points challenged by petitioner. Thus, petitioner's claim (Pet. 16-18) that the trial judge was unable to "engage in a legitimate and meaningful exercise of discretion" is belied by the correctness of his rulings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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